

may agree to use ADR. If the Contractor refuses an offer for alternative disputes resolution, the Contractor shall inform the Contracting Officer, in writing, of the Contractor's specific reasons for rejecting the request. When using arbitration conducted pursuant to 5 U.S.C. 575-580, or when using any other ADR technique that the agency elects to handle in accordance with the ADRA, any claim, regardless of amount, shall be accompanied by the certification described in subparagraph (d)(2)(iii) of this clause, and executed in accordance with subparagraph (d)(3) of this clause.

* * * * *

19. Section 52.233-2 is amended by revising the date of the clause and adding paragraph (c) to read as follows:

52.233-2 Service of Protest.

* * * * *

Service of Protest (Oct 1995)

* * * * *

(c) In this procurement, you may not protest to the GSBGA because of the nature of the supplies or services being procured. *(Contracting Officer shall strike the word "not" where the GSBGA is a correct forum.)*
(End of provision)

20. Section 52.233-3 is amended by revising the date of the clause and the first sentence of (a) to read as follows:

52.233-3 Protest after Award.

* * * * *

Protest After Award (Oct 1995)

* * * * *

(a) Upon receipt of a notice of protest (as defined in FAR 33.101) or a determination that a protest is likely (see FAR 33.102(d)), the Contracting Officer may, by written order to the Contractor, direct the Contractor to stop performance of the work called for by this contract. * * *

* * * * *

[FR Doc. 95-22777 Filed 9-15-95; 8:45 am]

BILLING CODE 6820-EP-P

48 CFR Parts 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 22, 23, 31, 36, 42, 44, 46, 47, 49, 52, and 53

[FAC 90-32; FAR Case 94-790; Item III]

RIN 9000-AG38

**Federal Acquisition Regulation;
Acquisition of Commercial Items**

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: This final rule is issued pursuant to the Federal Acquisition Streamlining Act of 1994 to implement

the revised statutory authorities in Title VIII of the Act for the acquisition of commercial items and components by Federal Government agencies as well as contractors and subcontractors at all levels. This regulatory action was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

EFFECTIVE DATE: October 1, 1995.

Applicability date: For solicitations issued on or after October 1, 1995; use of the new policies, provisions and clauses is optional for solicitations issued before December 1, 1995, and mandatory for solicitations issued after December 1, 1995.

FOR FURTHER INFORMATION CONTACT:

Colonel Laurence M. Trowel, Commercial Item Team Leader, at (703) 695-3858 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAC 90-32, FAR case 94-790.

SUPPLEMENTARY INFORMATION:

A. Background

The Federal Acquisition Streamlining Act of 1994, Pub. L. 103-355, provides authorities that streamline the acquisition process and minimize burdensome Government-unique requirements. This notice announces revisions developed under FAR case 94-790, Acquisition of Commercial Items, which encourage the acquisition of commercial end items and components by Federal Government agencies as well as contractors and subcontractors at all levels. The most significant revisions are in the following FAR parts:

Part 2 has been amended to incorporate the definitions of "commercial item," "component," "commercial component" and "nondevelopmental item" from the Act with only minor revisions for clarification. The clause at 52.202-1, Definitions, has been similarly revised to make the definitions available to prime and subcontractors.

Part 10 has been completely revised to address market research. It contains some language taken from the current FAR Part 11. This new part establishes the requirement for market research as the first step in the acquisition process. Market research is an essential element in the later steps of describing the agency's need, developing the overall acquisition strategy and identifying terms and conditions unique to the item being acquired.

Part 11 has been completely revised to address the process of describing agency needs. It contains some of the language on specifications and standards formerly found in FAR Part 10, but takes a more streamlined approach. In addition, the revised Part 11 establishes the Government's order of precedence for requirements documents and addresses the concept of market acceptance contained in the Act. The revised Part 11 also contains coverage on Delivery or Performance Schedules, Liquidated Damages, Priorities and Allocations, and Variations in Quantity taken from the current Part 12 with only minor editorial revisions. The current Part 12 coverage on Suspension of Work, Stop Work Orders, and Government Delay of Work has been moved to Subpart 42.13 with only minor editorial revisions.

Part 12 has been completely revised to address the acquisition of commercial items. The Team created this entirely new coverage to address in one FAR part the policies for the acquisition of commercial items.

—Subpart 12.1 states that the policies in the revised Part 12 are applicable to all acquisitions of commercial items above the micro-purchase threshold. The requirements of other parts of the FAR apply to commercial items to the extent they are not inconsistent with Part 12;

—Subpart 12.2 identifies special requirements for the acquisition of commercial items. These requirements generally reflect the requirements of Title VIII.

—Subpart 12.3 establishes standard provisions and clauses for use in the acquisition of commercial items. This approach is essential to meet the requirements of the statute and provide contracting officers and industry with an easy to use, simplified method for acquiring commercial items. However, it is essential that contracting officers be allowed to tailor solicitations and contracts to meet the needs of the particular acquisition and the marketplace for that item. Subpart 12.3 gives contracting officers broad authority to tailor solicitations and contracts, a practice itself that is consistent with commercial practices. The Act requires that some limitations be placed on this authority to tailor, and that has also been accommodated in this subpart.

—A new form, the Standard Form 1449, Solicitation/Contract/Order for Commercial Items, was established.

The SF 1449 combines features of the SF 33, Solicitation, Offer and Award; the SF 1447, Solicitation/Contract; and the DD 1155, Order for Supplies and Services. The most significant element is the addition of acceptance blocks at the bottom of the form (patterned after the DD Form 1155). This will allow suppliers of commercial items to utilize the SF 1449 to document receipt of the supplies or services by the government avoiding the need for preparation of separate receipt/acceptance forms.

—Subpart 12.5 identifies the applicability of certain laws to the acquisition of commercial items. This subpart is intended to meet the requirements of Section 8003(a) of the Act which requires that the FAR contain a list of laws determined to be inapplicable to prime contracts for commercial items.

—Section 12.503 contains the list of laws determined to be not applicable to executive agency prime contracts for acquisition of commercial items. This list has been expanded to also include those laws that have been revised in some manner to modify their applicability to commercial items. In each instance, the specific prescriptive language elsewhere in the FAR has been revised to reflect this modified applicability. FAR 12.503 only includes those laws that apply to prime contracts awarded by both DOD and civilian agencies. Agency unique laws determined to be not applicable to prime contracts are not addressed in this rule and may be addressed separately by the respective agencies.

—Section 12.504 contains the list of laws determined to be not applicable to subcontracts for commercial items. This list has been expanded to also include those laws that have been revised in some manner to modify their applicability to subcontracts for commercial items.

—Subpart 12.6 identifies two streamlined procedures for the evaluation and solicitation of contracts for commercial items. These procedures may be used at the discretion of the contracting officer.

Part 52 has been amended to include several new provisions and clauses to be inserted in all solicitations and contracts for the acquisition of commercial items:

—Section 52.212–1, Instructions to Offerors—Commercial Items, contains solicitation instructions unique to Government procurement and is based upon existing FAR language. The information has been simplified and tailored to meet the requirements of commercial items. For the most

part, the simplified paragraphs in the new provision do not contain new concepts.

—Section 52.212–2, Evaluation—Commercial Items, contains evaluation information that has been simplified and tailored to meet the requirements of commercial items. Again, this provision does not contain new concepts and is generally based upon provisions prescribed in Parts 14 and 15. This provision may be used at the discretion of the contracting officer. It requires the contracting officer to establish specific evaluation factors and the relative order of importance for each acquisition.

—Section 52.212–3, Offeror Representations and Certifications—Commercial Items, includes the certifications and representations required to comply with laws or Executive orders. Instead of using the numerous certifications contained in the FAR, the Team drafted a single provision containing all the requirements that may apply to the acquisition of commercial items.

—Section 52.212–4, Contract Terms and Conditions—Commercial Items, contains the terms and conditions the Team believes are consistent with customary commercial practice by addressing general areas that previous studies have identified as the “core” areas covered by commercial contracts. Several concepts included in the clause at 52.212–4 represent significant changes from standard Government practices to commercial-like practices.

—Section 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive orders—Commercial Items, implements provisions of law or executive orders applicable to Government acquisitions of commercial items or commercial components. The Team believes the clause at 52.212–5 represents the minimum number of clauses required to implement statutes and Executive orders. Certain clauses may apply depending upon the circumstances; the contracting officer will indicate which of these clauses apply for the specific acquisition. In addition, this clause provides that the contractor is not required to include any FAR provision or clause in its subcontracts other than those listed in the clause as applying to subcontracts for commercial items.

—Section 52.244–6, Subcontracts for Commercial Items and Commercial Components, implements the

preference for the acquisition of commercial items or nondevelopmental items as components of items to be supplied under Federal contracts. This clause will be inserted in all solicitations and contracts for supplies and services other than commercial items. It provides that the contractor is not required to include in its subcontracts for commercial items any FAR provision or clause, other than those listed in the clause.

B. Regulatory Flexibility Act

This final rule will have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* This rule will have this impact as a result of the following:

(1) It establishes a much broader definition of “commercial items” compared to the language of Part 11, it includes certain modifications to existing items, and includes certain commercial services. In all these cases, small business is very likely to benefit from this expanded definition;

(2) It establishes a requirement for conducting market research in certain circumstances before issuing solicitations which should benefit small business by ensuring the contracting activity has conducted sufficient research to be aware of the availability of commercial items and the practices used in the commercial marketplace to acquire them. The rule also cautions contracting officers not to request potential sources to submit more than the minimum information necessary as a part of market research.

(3) It establishes a preference for the acquisition of commercial items thereby enabling more small businesses that offer commercial items to participate in Government acquisition;

(4) It establishes a preference for stating Government requirements in terms of functions to be performed, performance required, or essential physical characteristics rather than detailed, Government-unique design specifications thereby allowing a broader range of products of small businesses to satisfy the Government need;

(5) It establishes the Government order of precedence for requirements documents emphasizing performance-oriented documents and nongovernment standards rather than Federal/Military-unique standards thereby allowing a broader range of small businesses to participate in Government acquisitions;

(6) It allows contracting officers the flexibility to use either the streamlined solicitation procedure in the revised Subpart 12.6 for acquiring commercial items, or the existing procedures in Parts 13, 14 or 15, as applicable, if they are more streamlined and beneficial, thereby allowing maximum flexibility for contracting with small businesses;

(7) It allows the use of the streamlined terms and conditions for acquiring commercial items for every acquisition above the micropurchase threshold thereby allowing the maximum number of small businesses to benefit from these procedures;

(8) It requires, except in unique circumstances, that the Government rely on the contractor's quality assurance system thereby allowing small businesses to utilize their own quality system when selling commercial items rather than a Government-specified system;

(9) It requires that, when acquiring commercial items, the contracting officer use the solicitation provisions and contract clauses specifically established for acquiring commercial items. The contracting officer may tailor those provisions and clauses when the customary practices in the market dictate the use of other terms and conditions or when a waiver is approved; and

(10) By significantly limiting the flow down of Government-unique terms and conditions to subcontractors at all levels thereby minimizing the burden on a significant number of small businesses.

A Final Regulatory Flexibility Analysis (FRFA) has been prepared and will be provided to the Chief Counsel for Advocacy for the Small Business Administration. A copy of the FRFA may be obtained from the FAR Secretariat.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 96-511) is deemed to apply because the final rule contains information collection requirements. Accordingly, a request for approval of a new information collection requirement concerning Acquisition of Commercial Items was submitted to the Office of Management and Budget and approved through OMB Control No. 9000-0136. Public comments concerning this request were invited in a Federal Register notice at 60 FR 11219, March 1, 1995.

D. Public Comments

Title VIII of the Act makes significant statutory revisions to facilitate the acquisition of commercial items and components by Federal Government

agencies, as well as contractors and subcontractors at all levels. This final rule incorporates revisions to two proposed rules resulting from a public meeting held on April 3, 1995, and written comments received in response to publication of the two proposed rules in the Federal Register. The first proposed rule was published in the Federal Register on March 1, 1995 (60 FR 11198), under FAR case 94-790. That proposed rule made changes throughout the FAR to incorporate provisions of Title VIII. The second proposed rule was published in the Federal Register on March 22, 1995 (60 FR 15220), under FAR case 94-791. That case contained the list of laws required by Section 8003(a) of the Act that were determined to be inapplicable to Executive agency contracts and subcontracts for commercial items. FAR case 94-791 also contained the list of contract clauses determined to be applicable to subcontracts for the acquisition of commercial items. On April 4, 1995, a correction to the proposed rule under FAR case 94-791 was published in the Federal Register (60 FR 17184), to correct section 52.212-5 to include access to contractor records by the Comptroller General of the United States for contracts awarded using other than sealed bidding in excess of the simplified acquisition threshold.

A total of 559 written comments were received on the proposed rule from 60 commentors. Each comment was analyzed by the Commercial Items Drafting Team and, where appropriate, changes were made in the proposed FAR language as reflected in this final rule. The comments largely fell in the following general areas:

1. Definitions of Commercial Items and Nondevelopmental Item

The language describing a "minor" modification was revised to clarify the intent. The revised language was drawn from a related Congressional report. The definition of nondevelopmental items was also clarified to alleviate confusion regarding what commentors identified as the "circular logic" of commercial items being a subset of nondevelopmental items, and certain nondevelopmental items being a subset of commercial items. The revision clarifies the distinction between commercial items and nondevelopmental items. Several commentors asked that specific examples of items that would be considered "commercial" be included in the definition. The Team rejected this suggestion citing the impossibility of developing examples that would

adequately describe the range of commercial items the government might buy while not unnecessarily limiting the breadth of the definition.

2. Decision to Utilize Commercial Items Authority

Several commentors expressed confusion over how the Government would decide when the commercial items authorities in Part 12 could be used. FAR 10.002 was revised to include language explaining the decision process that would follow the completion of market research.

3. Market Acceptance

Several commentors were concerned with the lack of sufficient guidance on market acceptance. Several changes were made in an effort to balance the concerns expressed by the public and those expressed by Government agencies. The final rule clarifies the circumstances where market acceptance may be appropriate, cautions that it is not appropriate when new or evolving commercial items may meet the agency's needs, and contains guidance on developing criteria for demonstrating market acceptance.

4. Relationship of Part 12 to Other FAR Parts

Several commentors expressed confusion over the relationship of Part 12 to other Parts, especially Part 13, Simplified Acquisition Procedures; Part 14, Sealed Bidding; and Part 15, Contracting By Negotiation. FAR 12.203 was revised to clarify that Part 12 contains unique policies for the acquisition of commercial items. These unique policies are intended to be used in conjunction with the existing procedures contained in Parts 13, 14, and 15 for the solicitation, evaluation, and award of contracts, purchase orders and other instruments. Part 12 will take precedence over other FAR parts only where the policies in those parts are inconsistent.

5. Use of the Standard Form (SF) 1449

Several commentors questioned the rationale for requiring the use of the new SF 1449 for all acquisitions of commercial items. The SF 1449 was specifically developed in conjunction with the provisions and clauses developed for the acquisition of commercial items. The SF 1449 and the prescribed provisions and clauses are designed to complement each other in several respects. Forms currently prescribed in the FAR contain references to FAR provisions and clauses that are not used for commercial items, and references to the Uniform

Contract Format, also not used for acquiring commercial items. Finally, the use of a single form throughout the Federal Government for all acquisitions of commercial items will aid those offerors that will, as a result of the publication of this rule, seek to do business with the Federal Government.

6. *Quality Assurance*

Several commentors questioned the intent of the language regarding the reliance on contractors' existing quality assurance systems. The rule has been revised to clarify that where buyer in-process inspection is a customary practice, any Government in-process inspection shall be conducted in a manner consistent with commercial practice.

7. *Commercial Item Pricing*

Commentors suggested that Part 12 should discuss the techniques for pricing commercial items. The policies and procedures for determining the price reasonableness of commercial items are contained in Subpart 15.8 and the Team did not want to conflict with those policies. However, a brief summary of pricing considerations used when contracting by negotiation under Part 15 has been included in Part 12.

8. *Technical Data and Computer Software*

In response to numerous comments on technical data and computer software, the final rule has been revised. The subpart on technical data has been revised to cover the general principle that the Government will acquire only technical data customarily provided to the public, except as provided by agency-specific statutes. The technical data subpart references FAR Part 27 and agency supplements, where detailed rules implementing the technical data statutes can be found. A new section on computer software was added to require that commercial computer software be acquired under licenses customarily provided to the public to the extent those licenses are consistent with Federal procurement law.

9. *Discretionary Use of FAR Provisions and Clauses*

Several commentors asked if existing FAR provisions and clauses could be used if needed. Guidance concerning the discretionary use of other FAR clauses, consistent with market research and customary commercial practice, has been provided in the final rule. Specific examples of FAR clauses that may be appropriate for use include clauses for ordering procedures for indefinite delivery contracts and option exercise.

10. *Tailoring of Provisions and Clauses*

Additional guidance concerning contracting officer authority to tailor Part 12 clauses, consistent with customary commercial market practices, has also been provided. Specific paragraphs of the clause at 52.212-4, Contract Terms and Conditions—Commercial Items, that are based in statute and may not be tailored, have been identified.

11. *Unique Requirements Regarding Terms and Conditions for Commercial Items*

Many commentors from both industry and Government noted that the new terms and conditions prescribed for commercial items are significantly different than the existing FAR provisions and clauses. In response to the numerous questions and concerns, the Team expanded the discussion in the proposed rule describing the key features of these unique provisions and clauses.

12. *Laws Inapplicable to Contractors and Subcontractors*

The language describing the laws determined inapplicable to prime and subcontractors has been revised to clarify several areas of confusion. In addition, the Service Contract Act (SCA) was added to the list of laws inapplicable to subcontractors. The proposed rule clearly did not call out the SCA for flow down to subcontractors in paragraph (e) of the clause at 52.212-5, but inadvertently omitted the law from the list of laws inapplicable to subcontractors. Finally, as indicated in the March 22, 1995, Federal Register notice, the DOD-unique laws identified in the proposed rule have been removed from the FAR rule and will appear in the DOD FAR Supplement (DFARS) coverage.

13. *Certification Regarding Debarment and Suspension*

A certification regarding an offeror's debarment, suspension or ineligibility for award was added to the provision at 52.212-3 to implement the requirements of Executive Order 12549.

14. *Acceptance and Warranties*

The language concerning acceptance and warranties in the clause at 52.212-4 was revised to incorporate the acceptance principles found in the Uniform Commercial Code. It was also revised to establish the implied warranties of merchantability and fitness for a particular purpose as the Government's minimum warranties. Corresponding guidance is provided in

Part 12 on evaluating and incorporating express warranties, which may overcome the implied warranties, and ensuring any express warranty and the acceptance terms of the contract are consistent with the concepts contained in the rule.

15. *Terminations*

Guidance on procedures for contract terminations, reflecting the language in the clause at 52.212-4, has been provided in FAR Part 12. In addition, language has been included to clarify that negotiation of termination charges in terminations for the Government's convenience does not require government unique record keeping, compliance with the cost accounting standards or the contract cost principles.

16. *Limitation of Liability*

The limitation of contractor liability language, which appeared in the proposed rule in the "Warranty" paragraph of the clause at 52.212-4, has been moved to a separate paragraph to clarify that the limitation does not apply solely to liability relating to any warranty.

17. *Subcontracting Plans*

The requirement for Small, Small Disadvantaged and Women Owned Small Business Subcontracting Plans was included in the clause at 52.212-5 after it was determined that there was no exemption from this requirement for commercial items. However, in this regard, the Office of Procurement Policy (OFPP) is preparing to issue Policy Letter 95-1, Subcontracting Plans for Companies Supplying Commercial Items. This Policy Letter states that when a subcontracting plan is required, annual commercial subcontracting plans that relate to the company's commercial and noncommercial production are authorized and preferred for (1) prime contracts for commercial items; or (2) subcontractors that provide commercial items under a prime contract, whether or not the prime contractor is supplying a commercial item. The policy revisions contained in Policy Letter 95-1 will be incorporated into the FAR by a separate FAR case.

18. *Other Revisions to the Proposed Rule*

Numerous other revisions were made to the proposed rule to correct inconsistencies, clarify intent, improve editorial clarity and to bring the language of the case up to the latest FAR baseline through FAC 90-31.

List of Subjects in 48 CFR Parts 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 22, 23, 31, 36, 42, 44, 46, 47, 49, 52 and 53

Government procurement.

Dated: September 7, 1995.

Edward C. Loeb,

*Deputy Project Manager for the
Implementation of the Federal Acquisition
Streamlining Act of 1994.*

Therefore, 48 CFR Parts 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 22, 23, 31, 36, 42, 44, 46, 47, 49, 52, and 53 are amended as set forth below:

1. The authority citation for 48 CFR Parts 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 22, 23, 31, 36, 42, 44, 46, 47, 49, 52, and 53 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

2. Section 2.101 is amended by adding in alphabetical order the definitions "Commercial component", "Commercial item", "Component", "Market research", and "Nondevelopmental item" to read as follows:

2.101 Definitions.

* * * * *

Commercial component means any component that is a commercial item.

Commercial item means—

(a) Any item, other than real property, that is of a type customarily used for nongovernmental purposes and that—

(1) Has been sold, leased, or licensed to the general public; or,

(2) Has been offered for sale, lease, or license to the general public;

(b) Any item that evolved from an item described in paragraph (a) of this definition through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation;

(c) Any item that would satisfy a criterion expressed in paragraphs (a) or (b) of this definition, but for—

(1) Modifications of a type customarily available in the commercial marketplace; or

(2) Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements. "Minor" modifications means modifications that do not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process. Factors to be considered in

determining whether a modification is minor include the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor;

(d) Any combination of items meeting the requirements of paragraphs (a), (b), (c), or (e) of this definition that are of a type customarily combined and sold in combination to the general public;

(e) Installation services, maintenance services, repair services, training services, and other services if such services are procured for support of an item referred to in paragraphs (a), (b), (c), or (d) of this definition, and if the source of such services—

(1) Offers such services to the general public and the Federal Government contemporaneously and under similar terms and conditions; and

(2) Offers to use the same work force for providing the Federal Government with such services as the source uses for providing such services to the general public;

(f) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions. This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed;

(g) Any item, combination of items, or service referred to in paragraphs (a) through (f), notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor; or

(h) A nondevelopmental item, if the procuring agency determines the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local governments.

Component means any item supplied to the Federal Government as part of an end item or of another component.

* * * * *

Market research means collecting and analyzing information about capabilities within the market to satisfy agency needs.

* * * * *

Nondevelopmental item means—

(a) Any previously developed item of supply used exclusively for governmental purposes by a Federal agency, a State or local government, or a foreign government with which the United States has a mutual defense cooperation agreement;

(b) Any item described in paragraph (a) of this definition that requires only minor modification or modifications of a type customarily available in the commercial marketplace in order to meet the requirements of the procuring department or agency; or

(c) Any item of supply being produced that does not meet the requirements of paragraph (a) or (b) solely because the item is not yet in use.

* * * * *

PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

3. Section 3.404 is amended by removing "or" from the end of paragraph (b)(4); by redesignating paragraph (b)(5) as (b)(6) and adding a new paragraph (b)(5); and by revising paragraph (c) to read as follows:

3.404 Solicitation provision and contract clause.

* * * * *

(b) * * *

(5) The solicitation is for a commercial item (see parts 2 and 12); or

* * * * *

(c) The contracting officer shall insert the clause at 52.203-5, Covenant Against Contingent Fees, in solicitations and contracts exceeding the simplified acquisition threshold in part 13 other than those for commercial items (see Parts 2 and 12).

4. Section 3.502-2 is amended by revising the introductory text of paragraph (i) to read as follows:

3.502-2 General.

* * * * *

(i) Requires each contracting agency to include in each prime contract, except contracts for commercial items (see part 12), a requirement that the prime contractor shall—

* * * * *

5. Section 3.502-3 is revised to read as follows:

3.502-3 Contract clause.

The contracting officer shall insert the clause at 52.203-7, Anti-Kickback Procedures, in solicitations and contracts exceeding the simplified acquisition threshold in part 13, other than those for commercial items (see part 12).

6. Section 3.503-2 is revised to read as follows:

3.503-2 Contract clause.

The contracting officer shall insert the clause at 52.203-6, Restrictions on Subcontractor Sales to the Government, in solicitations and contracts exceeding the simplified acquisition threshold in

part 13. For the acquisition of commercial items, the contracting officer shall use the clause with its Alternate I.

PART 5—PUBLICIZING CONTRACT ACTIONS

7. Section 5.203 is amended by revising paragraphs (a), (b), and (c) to read as follows:

5.203 Publicizing and response time.

(a) A notice of contract action shall be published in the CBD at least 15 days before issuance of a solicitation except when the combined CBD synopsis/solicitation procedure for acquisition of commercial items is used (see 12.603).

(b) The contracting officer shall establish a solicitation response time which will afford potential offerors a reasonable opportunity to respond for (1) each contract action, including actions via FACNET, in an amount estimated to be greater than \$25,000, but not greater than the simplified acquisition threshold; or (2) each contract action for the acquisition of commercial items in an amount estimated to be greater than \$25,000 (see part 12). The contracting officer should consider the circumstances of the individual acquisition, such as the complexity, commerciality, availability, and urgency, when establishing the solicitation response time.

(c) Except for the acquisition of commercial items (see 5.203(b)), agencies shall allow at least a 30-day response time for receipt of bids or proposals from the date of issuance of a solicitation, if the contract action is expected to exceed the simplified acquisition threshold.

* * * * *

8. Section 5.207 is amended by adding paragraph (e)(4) to read as follows:

5.207 Preparation and transmittal of synopses.

* * * * *

(e) * * *

(4) If, under the proposed acquisition, the Government does not intend to acquire a commercial item using part 12, the synopsis shall refer to Numbered Note 26.

* * * * *

PART 6—COMPETITION REQUIREMENTS

9. Section 6.303-2 is amended by revising paragraph (a)(8) to read as follows:

6.303-2 Content.

(a) * * *

(8) A description of the market research conducted (see part 10) and the results or a statement of the reason market research was not conducted.

* * * * *

10. Section 6.502 is revised to read as follows:

6.502 Duties and responsibilities.

(a) Agency and procuring activity competition advocates are responsible for promoting the acquisition of commercial items, promoting full and open competition, challenging requirements that are not stated in terms of functions to be performed, performance required or essential physical characteristics, and challenging barriers to the acquisition of commercial items and full and open competition such as unnecessarily restrictive statements of work, unnecessarily detailed specifications, and unnecessarily burdensome contract clauses.

(b) Agency competition advocates shall—

(1) Review the contracting operations of the agency and identify and report to the agency senior procurement executive—

(i) Opportunities and actions taken to acquire commercial items to meet the needs of the agency;

(ii) Opportunities and actions taken to achieve full and open competition in the contracting operations of the agency;

(iii) Actions taken to challenge requirements that are not stated in terms of functions to be performed, performance required or essential physical characteristics;

(iv) Any condition or action that has the effect of unnecessarily restricting the acquisition of commercial items or competition in the contracting actions of the agency;

(2) Prepare and submit an annual report to the agency senior procurement executive, in accordance with agency procedures, describing—

(i) Such advocate's activities under this subpart;

(ii) New initiatives required to increase the acquisition of commercial items;

(iii) New initiatives required to increase competition;

(iv) New initiatives to ensure requirements are stated in terms of functions to be performed, performance required or essential physical characteristics;

(v) Any barriers to the acquisition of commercial items or competition that remain; and

(vi) Other ways in which the agency has emphasized the acquisition of commercial items and competition in

areas such as acquisition training and research;

(3) Recommend to the senior procurement executive of the agency goals and plans for increasing competition on a fiscal year basis; and

(4) Recommend to the senior procurement executive of the agency a system of personal and organizational accountability for competition, which may include the use of recognition and awards to motivate program managers, contracting officers, and others in authority to promote competition in acquisition.

PART 7—ACQUISITION PLANNING

7.101 [Amended]

11. Section 7.101 is amended by removing the definition "Market survey".

12. Section 7.102 is revised to read as follows:

7.102 Policy.

(a) Agencies shall perform acquisition planning and conduct market research (see part 10) for all acquisitions in order to promote and provide for—

(1) Acquisition of commercial items or, to the extent that commercial items suitable to meet the agency's needs are not available, nondevelopmental items, to the maximum extent practicable (10 U.S.C. 2377 and 41 U.S.C. 251, *et seq.*); and

(2) Full and open competition (see part 6) or, when full and open competition is not required in accordance with part 6, to obtain competition to the maximum extent practicable, with due regard to the nature of the supplies or services to be acquired (10 U.S.C. 2301(a)(5) and 41 U.S.C. 253a(a)(1)).

(b) This planning shall integrate the efforts of all personnel responsible for significant aspects of the acquisition. The purpose of this planning is to ensure that the Government meets its needs in the most effective, economical, and timely manner. Agencies that have a detailed acquisition planning system in place that generally meets the requirements of 7.104 and 7.105 need not revise their system to specifically meet all of these requirements.

13. Section 7.103 is amended by revising paragraph (b); and in paragraph (m) by removing "10.002(c)" and inserting "11.001(b)" to read as follows:

7.103 Agency-head responsibilities.

* * * * *

(b) Encouraging offerors to supply commercial items, or to the extent that commercial items suitable to meet the agency needs are not available,

nondevelopmental items in response to agency solicitations (10 U.S.C. 2377 and 41 U.S.C. 251, *et seq.*); and

* * * * *

14. Section 7.105 is amended in paragraph (a)(5) by removing "subpart 12.1" and inserting "subpart 11.4" in its place; in paragraph (a)(8)(iii) by removing the parenthetical "(see 10.002(c))"; by revising paragraph (b)(1); in paragraph (b)(6) by removing "part 10" and inserting "part 11" in its place; in paragraph (b)(7) by removing "subpart 12.3" and inserting "subpart 11.6" in its place; and by revising paragraph (b)(12)(i) to read as follows:

7.105 Contents of written acquisition plans.

* * * * *

(b) *Plan of action*—(1) *Sources*. Indicate the prospective sources of supplies and/or services that can meet the need. Consider required sources of supplies or services (see part 8). Include consideration of small business, small disadvantaged business, and women-owned small business concerns (see part 19). Address the extent and results of the market research and indicate their impact on the various elements of the plan (see part 10).

* * * * *

(12) * * *

(i) The assumptions determining contractor or agency support, both initially and over the life of the acquisition, including consideration of contractor or agency maintenance and servicing (see subpart 7.3) and distribution of commercial items;

* * * * *

PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

8.1104 [Amended]

15. Section 8.1104 is amended in paragraph (e)(1) by removing "52.212-9" and inserting "52.211-16" in its place.

PART 9—CONTRACTOR QUALIFICATIONS

16. Section 9.106-1 is amended by revising paragraph (a) to read as follows:

9.106-1 Conditions for preaward surveys.

(a) A preaward survey is normally required when the information on hand or readily available to the contracting officer is not sufficient to make a determination regarding responsibility. However, if the contemplated contract will have a fixed price at or below the simplified acquisition threshold or will involve the acquisition of commercial items (see part 12), the contracting officer should not request a preaward

survey unless circumstances justify its cost.

* * * * *

17. Section 9.306 is amended in the introductory text of paragraph (f) by revising the parenthetical to read "(see 11.404)".

18. Section 9.405-2 is amended by revising the second sentence of paragraph (b) introductory text to read as follows:

9.405-2 Restrictions on subcontracting.

* * * * *

(b) * * * By operation of the clause at 52.209-6, Protecting the Government's Interests When Subcontracting with Contractors Debarred, Suspended or Proposed for Debarment, contractors shall not enter into any subcontract in excess of \$25,000 with a contractor that has been debarred, suspended, or proposed for debarment unless there is a compelling reason to do so. * * *

* * * * *

19. Part 10 is revised to read as follows:

PART 10—MARKET RESEARCH

Sec.

10.000 Scope of part.

10.001 Policy.

10.002 Procedures.

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

10.000 Scope of part.

This part prescribes policies and procedures for conducting market research to arrive at the most suitable approach to acquiring, distributing, and supporting supplies and services. This part implements requirements of 41 U.S.C. 253a(a)(1), 41 U.S.C. 264b, and 10 U.S.C. 2377.

10.001 Policy.

(a) Agencies shall—

(1) Ensure that legitimate needs are identified and trade-offs evaluated to acquire items which meet those needs;

(2) Conduct market research appropriate to the circumstances—

(i) Before developing new requirements documents for an acquisition by that agency;

(ii) Before soliciting offers for acquisitions with an estimated value in excess of the simplified acquisition threshold; and

(iii) Before soliciting offers for acquisitions with an estimated value less than the simplified acquisition threshold when adequate information is not available and the circumstances justify its cost; and

(3) Use the results of market research to—

(i) Determine if sources capable of satisfying the agency's requirements exist;

(ii) Determine if commercial items or, to the extent commercial items suitable to meet the agency's needs are not available, nondevelopmental items are available that—

(A) Meet the agency's requirements;

(B) Could be modified to meet the agency's requirements; or

(C) Could meet the agency's requirements if those requirements were modified to a reasonable extent;

(iii) Determine the extent to which commercial items or nondevelopmental items could be incorporated at the component level;

(iv) Determine the practices of firms engaged in producing, distributing, and supporting commercial items, such as terms for warranties, buyer financing, maintenance and packaging, and marking; and

(v) Ensure maximum practicable use of recovered materials (see subpart 23.4) and promote energy conservation and efficiency.

(b) When conducting market research, agencies should not request potential sources to submit more than the minimum information necessary.

10.002 Procedures.

(a) Acquisitions begin with a description of the Government's needs stated in terms sufficient to allow conduct of market research.

(b) Market research is then conducted to determine if commercial items or nondevelopmental items are available to meet the Government's needs or could be modified to meet the Government's needs.

(1) The extent of market research will vary, depending on such factors as urgency, estimated dollar value, complexity, and past experience. Market research involves obtaining information specific to the item being acquired and should include—

(i) Whether the Government's needs can be met by—

(A) Items of a type customarily available in the commercial marketplace;

(B) Items of a type customarily available in the commercial marketplace with modifications; or

(C) Items used exclusively for governmental purposes;

(ii) Customary practices regarding customizing, modifying or tailoring of items to meet customer needs and associated costs;

(iii) Customary practices, including warranty, buyer financing, discounts, etc., under which commercial sales of the products are made;

(iv) The requirements of any laws and regulations unique to the item being acquired;

(v) The availability of items that contain recovered materials and items that are energy efficient;

(vi) The distribution and support capabilities of potential suppliers, including alternative arrangements and cost estimates; and

(vii) Size and status of potential sources (see part 19).

(2) Techniques for conducting market research may include any or all of the following:

(i) Contacting knowledgeable individuals in Government and industry regarding market capabilities to meet requirements.

(ii) Reviewing the results of recent market research undertaken to meet similar or identical requirements.

(iii) Publishing formal requests for information in appropriate technical or scientific journals or business publications.

(iv) Querying Government data bases that provide information relevant to agency acquisitions.

(v) Participating in interactive, on-line communication among industry, acquisition personnel, and customers.

(vi) Obtaining source lists of similar items from other contracting activities or agencies, trade associations or other sources.

(vii) Reviewing catalogs and other generally available product literature published by manufacturers, distributors, and dealers or available on-line.

(viii) Conducting interchange meetings or holding presolicitation conferences to involve potential offerors early in the acquisition process.

(c) If market research indicates commercial or nondevelopmental items might not be available to satisfy agency needs, agencies shall reevaluate the need in accordance with 10.001(a)(3)(ii) and determine whether the need can be restated to permit commercial or nondevelopmental items to satisfy the agency's needs.

(d)(1) If market research establishes that the Government's need may be met by a type of item or service customarily available in the commercial marketplace that would meet the definition of a commercial item at subpart 2.1, the contracting officer shall solicit and award any resultant contract using the policies and procedures in part 12.

(2) If market research establishes that the Government's need cannot be met by a type of item or service customarily available in the marketplace, part 12 shall not be used. When publication of the notice at 5.201 is required, the

contracting officer shall include a notice to prospective offerors that the Government does not intend to use part 12 for the acquisition (see 5.207(e)(4)).

(e) Agencies should document the results of market research in a manner appropriate to the size and complexity of the acquisition.

20. Part 11 is revised to read as follows:

PART 11—DESCRIBING AGENCY NEEDS

Sec.

11.000 Scope of part.

11.001 Definitions.

11.002 Policy.

Subpart 11.1—Selecting and Developing Requirements Documents

11.101 Order of precedence for requirements documents.

11.102 Standardization program.

11.103 Market acceptance.

11.104 Items peculiar to one manufacturer.

Subpart 11.2—Using and Maintaining Requirements Documents

11.201 Identification and availability of specifications.

11.202 Maintenance of standardization documents.

11.203 Customer satisfaction.

11.204 Solicitation provisions and contract clauses.

Subpart 11.3—Acquiring Other Than New Material, Former Government Surplus Property and Residual Inventory

11.301 Policy.

11.302 Solicitation provisions and contract clauses.

Subpart 11.4—Delivery or Performance Schedules

11.401 General.

11.402 Factors to consider in establishing schedules.

11.403 Supplies or services.

11.404 Contract clauses.

Subpart 11.5—Liquidated Damages

11.501 General.

11.502 Policy.

11.503 Procedures.

11.504 Contract clauses.

Subpart 11.6—Priorities and Allocations

11.600 Scope of part.

11.601 Definitions.

11.602 General.

11.603 Procedures.

11.604 Solicitation provisions and contract clauses.

Subpart 11.7—Variation in Quantity

11.701 Supply contracts.

11.702 Construction contracts.

11.703 Contract clauses.

11.000 Scope of part.

This part prescribes policies and procedures for describing agency needs.

11.001 Definitions.

Material, as used in this part, includes, but is not limited to, raw material, parts, items, components, and end products.

New, as used in this part, means previously unused or composed of previously unused materials and may include unused residual inventory or unused former Government surplus property.

Other than new, as used in this part, includes, but is not limited to, recycled, recovered, remanufactured, used, and reconditioned.

Reconditioned, as used in this part, means restored to an earlier normal operating condition by readjustments and replacement of parts.

Remanufactured, as used in this part, means factory rebuilt to new equipment performance specification and unused subsequent to rebuilding.

11.002 Policy.

(a) In fulfilling requirements of 10 U.S.C. 2305(a)(1), 10 U.S.C. 2377, 41 U.S.C. 253a(a), and 41 U.S.C. 264b, agencies shall—

(1) Specify needs using market research in a manner designed to—
(i) Promote full and open competition (see part 6), with due regard to the nature of the supplies or services to be acquired; and

(ii) Only include restrictive provisions or conditions to the extent necessary to satisfy the minimum needs of the agency or as authorized by law.

(2) To the maximum extent practicable, ensure that acquisition officials—

(i) State requirements with respect to an acquisition of supplies or services in terms of—

(A) Functions to be performed;

(B) Performance required; or

(C) Essential physical characteristics;

(ii) Define requirements in terms that enable and encourage offerors to supply commercial items, or, to the extent that commercial items suitable to meet the agency's needs are not available, nondevelopmental items, in response to the agency solicitations;

(iii) Provide offerors of commercial items and nondevelopmental items an opportunity to compete in any acquisition to fill such requirements;

(iv) Require prime contractors and subcontractors at all tiers under the agency contracts to incorporate commercial items or nondevelopmental items as components of items supplied to the agency; and

(v) Modify requirements in appropriate cases to ensure that the requirements can be met by commercial items or, to the extent that commercial

items suitable to meet the agency's needs are not available, nondevelopmental items.

(b) The Metric Conversion Act of 1975, as amended by the Omnibus Trade and Competitiveness Act of 1988 (15 U.S.C. 205a, *et seq.*), designates the metric system of measurement as the preferred system of weights and measures for United States trade and commerce, and it requires that each agency use the metric system of measurement in its acquisitions, except to the extent that such use is impracticable or is likely to cause significant inefficiencies or loss of markets to United States firms. Requiring activities are responsible for establishing guidance implementing this policy in formulating their requirements for acquisitions.

(c) To the extent practicable and consistent with subpart 9.5, potential offerors should be given an opportunity to comment on agency requirements or to recommend application and tailoring of requirements documents and alternative approaches. Requiring agencies should apply specifications, standards, and related documents initially for guidance only, making final decisions on the application and tailoring of these documents as a product of the design and development process. Requiring agencies should not dictate detailed design solutions prematurely (see 7.101 and 7.105(a)(8)).

(d) The Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6901, *et seq.*), as amended, and Executive Order 12873, dated October 20, 1993, establish requirements for the procurement of products containing recovered materials, and environmentally preferable and energy-efficient products and services. Requiring activities shall prepare plans, drawings, specifications, standards (including voluntary standards), and purchase descriptions that consider the requirements set forth in part 23.

Subpart 11.1—Selecting and Developing Requirements Documents

11.101 Order of precedence for requirements documents.

(a) Agencies may select from existing requirements documents, modify or combine existing requirements documents, or create new requirements documents to meet agency needs, consistent with the following order of precedence:

- (1) Documents mandated for use by law.
- (2) Performance-oriented documents.
- (3) Detailed design-oriented documents.

(4) Standards, specifications and related publications issued by the Government outside the Defense or Federal series for the non-repetitive acquisition of items.

(b) Agencies should prepare product descriptions to achieve maximum practicable use of recovered material and other materials that are environmentally preferable (see subparts 23.4 and 23.7).

11.102 Standardization program.

Agencies shall select existing requirements documents or develop new requirements documents that meet the needs of the agency in accordance with the guidance contained in the Federal Standardization Manual and, for DOD components, DOD 4120.3-M, Defense Standardization Program Policies and Procedures. The Federal Standardization Manual may be obtained from General Services Administration, Federal Supply Service Bureau, Specifications Section, Suite 8100, 470 L'Enfant Plaza, SW, Washington, DC 20407. DOD 4120.3-M may be obtained from DOD Single Stock Point, Standardization Document Order Desk, Building 4D, 700 Robbins Avenue, Philadelphia, PA 19111-5094.

11.103 Market acceptance.

(a) Section 8002(c) of Pub. L. 103-355 provides that, in accordance with agency procedures, the head of an agency may, under appropriate circumstances, require offerors to demonstrate that the items offered—

- (1) Have either—
 - (i) Achieved commercial market acceptance; or
 - (ii) Been satisfactorily supplied to an agency under current or recent contracts for the same or similar requirements; and
- (2) Otherwise meet the item description, specifications, or other criteria prescribed in the public notice and solicitation.

(b) Appropriate circumstances may, for example, include situations where the agency's minimum need is for an item that has a demonstrated reliability, performance or product support record in a specified environment. Use of market acceptance is inappropriate when new or evolving items may meet the agency's needs.

(c) In developing criteria for demonstrating that an item has achieved commercial market acceptance, the contracting officer shall ensure the criteria in the solicitation—

- (1) Reflect the minimum need of the agency and are reasonably related to the demonstration of an item's acceptability to meet the agency's minimum need;

(2) Relate to an item's performance and intended use, not an offeror's capability;

(3) Are supported by market research;

(4) Include consideration of items supplied satisfactorily under recent or current Government contracts, for the same or similar items; and

(5) Consider the entire relevant commercial market, including small business concerns.

(d) Commercial market acceptance shall not be used as a sole criterion to evaluate whether an item meets the Government's requirements.

(e) When commercial market acceptance is used, the contracting officer shall document the file to—

- (1) Describe the circumstances justifying the use of commercial market acceptance criteria; and
- (2) Support the specific criteria being used.

11.104 Items peculiar to one manufacturer.

Agency requirements shall not be written so as to require a particular brand-name, product, or a feature of a product, peculiar to one manufacturer, thereby precluding consideration of a product manufactured by another company, unless—

(a) The particular brand-name, product, or feature is essential to the Government's requirements, and market research indicates other companies' similar products, or products lacking the particular feature, do not meet, or can not be modified to meet, the agency's minimum needs; and

(b) The authority to contract without providing for full and open competition is supported by the required justifications and approvals (see 6.302-1).

Subpart 11.2—Using and Maintaining Requirements Documents

11.201 Identification and availability of specifications.

(a) Solicitations citing requirements documents listed in the General Services Administration (GSA) Index of Federal Specifications, Standards and Commercial Item Descriptions, the DoD Index of Specifications and Standards (DoDISS), or other agency index shall identify each document's approval date and the dates of any applicable amendments and revisions. Do not use general identification references, such as "the issue in effect on the date of the solicitation." Contracting offices will not normally furnish these cited documents with the solicitation, except when—

- (1) The requirements document must be furnished with the solicitation to

enable prospective contractors to make a competent evaluation of the solicitation;

(2) In the judgment of the contracting officer, it would be impracticable for prospective contractors to obtain the documents in reasonable time to respond to the solicitation; or

(3) A prospective contractor requests a copy of a Government promulgated requirements document.

(b) Contracting offices shall clearly identify in the solicitation any pertinent documents not listed in the GSA Index of Federal Specifications, Standards and Commercial Item Descriptions or DoDISS. Such documents shall be furnished with the solicitation or specific instructions shall be furnished for obtaining or examining such documents.

(c) When documents refer to other documents, such references shall

(1) Be restricted to documents, or appropriate portions of documents, that apply in the acquisition;

(2) Cite the extent of their applicability;

(3) Not conflict with other documents and provisions of the solicitation; and

(4) Identify all applicable first tier references.

(d) The GSA Index of Federal Specifications, Standards and Commercial Item Descriptions may be purchased from the General Services Administration, Federal Supply Service Bureau, Specification Section, Suite 8100, 470 L'Enfant Plaza, SW, Washington, DC 20407, telephone (202) 755-0325/0326. The DoDISS may be purchased from the Standardization Documents Desk, Building 4D, 700 Robbins Avenue, Philadelphia, PA 19111-5094, telephone (215) 697-2569.

(e) Agencies may generally obtain from the GSA Specification Section or the DOD Standardization Documents Desk those nongovernment (voluntary) standards adopted for use by Federal or Defense activities. Standards not available from these sources may be obtained from Government libraries, activities subscribing to document handling services or the organization responsible for the preparation, publication or maintenance of the standard.

11.202 Maintenance of standardization documents.

(a) Recommendations for changes to standardization documents listed in the GSA Index of Federal Specifications, Standards and Commercial Item Descriptions should be submitted to the General Services Administration, Federal Supply Service, Office of Acquisition, Washington, DC 20406.

Agencies shall submit recommendations for changes to standardization documents listed in the DoDISS to the cognizant preparing activity.

(b) When an agency cites an existing standardization document but modifies it to meet its needs, the agency shall follow the guidance in Federal Standardization Manual and, for Defense components, DoD 4120.3-M, Defense Standardization Program Policies and Procedures.

11.203 Customer satisfaction.

Acquisition organizations shall communicate with customers to determine how well the requirements document reflects the customer's needs and to obtain suggestions for corrective actions. Whenever practicable, the agency may provide affected industry an opportunity to comment on the requirements documents.

11.204 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert the provision at 52.211-1, Availability of Specifications Listed in the GSA Index of Federal Specifications, Standards and Commercial Item Descriptions, in solicitations that

(1) Are issued by civilian agency contracting offices and

(2) Cite specifications listed in the Index that are not furnished with the solicitation.

(b) The contracting officer shall insert the provision at 52.211-2, Availability of Specifications and Standards (DoDISS), in solicitations that

(1) Are issued by DoD contracting offices and

(2) Cite specifications listed in the DoDISS that are not furnished with the solicitation.

(c) The contracting officer shall insert a provision substantially the same as the provision at 52.211-3, Availability of Specifications Not Listed in the GSA Index of Federal Specifications, Standards and Commercial Item Descriptions, in solicitations that cite specifications that are not listed in the Index and are not furnished with the solicitation, but may be obtained from a designated source.

(d) The contracting officer shall insert a provision substantially the same as the provision at 52.211-4, Availability for Examination of Specifications Not Listed in the GSA Index of Federal Specifications, Standards and Commercial Item Descriptions, in solicitations that cite specifications that are not listed in the Index and are available for examination at a specified location.

Subpart 11.3—Acquiring Other Than New Material, Former Government Surplus Property, and Residual Inventory

11.301 Policy.

(a) Agencies shall allow offers of other than new material, former Government surplus property, or residual inventory unless it is determined that such materials are unacceptable. When acquiring commercial items, the contracting officer should consider the customary practice in the industry for the item being acquired. When only new material is acceptable, the solicitation shall clearly identify the material that must be new. Offerors providing other than new material shall be required to comply with the clause at 52.211-5, New Material, the provision at 52.211-6, Listing of Other Than New Material, Residual Inventory, and Former Government Surplus Property, and the clause at 52.211-7, Other Than New Material, Residual Inventory, and Former Government Surplus Property, as appropriate.

(b) Agencies shall specify products, including packaging, that contain the highest practicable percentage of recovered and environmentally preferable materials, and where applicable, post-consumer material, consistent with performance requirements, availability, price reasonableness, and cost-effectiveness.

(c) Contracting officers shall consider the following when determining whether other than new materials, former Government surplus property, or residual inventory are acceptable:

(1) Safety of persons or property.

(2) Specification and performance requirements.

(3) Price reasonableness.

(4) Total cost to the Government (including maintenance, inspection, testing, and useful life).

(d) When a contract calls for material to be furnished at cost, the allowable charge for former Government surplus property shall not exceed the cost at which the contractor acquired the property.

11.302 Solicitation provisions and contract clauses.

(a) The contracting officer may insert the clause at 52.211-5, New Material, in solicitations and contracts for supplies. The clause shall not be used if it would be contrary to customary commercial practices for the item being acquired.

(b) The contracting officer shall insert the provision at 52.211-6, Listing of Other Than New Material, Residual Inventory, and Former Government

Surplus Property, in solicitations containing the clause at 52.211-5.

(c) The contracting officer shall insert the clause at 52.211-7, Other Than New Material, Residual Inventory, and Former Government Surplus Property, in contracts containing the clause at 52.211-5.

Subpart 11.4—[Redesignated from 12.1]

21. and 22. Subpart 11.4 is redesignated from Subpart 12.1 and sections 12.101 through 12.104 are redesignated as sections 11.401 through 11.404, respectively.

23. Newly redesignated section 11.401 is amended in paragraph (a) by revising the last sentence; and in the parenthetical of paragraph (c) by removing "Subpart 12.2" and inserting "Subpart 11.5". The revised text reads as follows:

11.401 General.

(a) * * * Schedules that are unnecessarily short or difficult to attain

(1) Tend to restrict competition,
(2) Are inconsistent with small business policies, and

(3) May result in higher contract prices.

* * * * *

24. Newly redesignated section 11.402 is amended by revising paragraphs (a) (2) and (5) to read as follows:

11.402 Factors to consider in establishing schedules.

(a) * * *

(2) Industry practices;

* * * * *

(5) Production time;

* * * * *

11.404 [Amended]

25. Newly redesignated section 11.404 is amended in paragraph (a)(2) by removing "52.212-1" and inserting "52.211-8"; in paragraph (a)(3) by removing "52.212-2" and inserting "52.211-9"; and in paragraph (b) by removing "52.212-3" and inserting "52.211-10".

Subpart 11.5—[Redesignated From Subpart 12.2]

26. Subpart 11.5 is redesignated from Subpart 12.2 and sections 11.501 through 11.504 are redesignated from sections 12.201 through 12.204, respectively.

11.504 [Amended]

27. Newly designated 11.504 is amended in paragraph (a) by removing "52.212-4" and inserting "52.211-11"; in paragraph (b) by removing "52.212-

5" and inserting "52.211-12"; and in paragraph (c) by removing "52.212-6" and "52.212-5" and inserting "52.211-13" and "52.211-12", respectively.

Subpart 11.6 [Redesignated From 12.3]

28. Subpart 11.6 is redesignated from Subpart 12.3 and sections 11.600 through 11.604 are redesignated from sections 12.300 through 12.304, respectively.

11.604 [Amended]

29. Newly redesignated section 11.604 is amended in paragraph (a) by removing "52.212-7" and inserting "52.211-14"; and in paragraph (b) by removing "52.212-8" and inserting "52.211-15".

Subpart 11.7—[Redesignated From 12.4]

30. Subpart 11.7 is redesignated from Subpart 12.4 and sections 11.701 through 11.703 are redesignated from 12.401 through 12.403, respectively.

11.703 [Amended]

31. Newly redesignated section 11.703 is amended in paragraph (a) by removing "52.212-9" and inserting "52.211-16"; in paragraph (b) by removing "52.212-10" and inserting "52.211-17"; and in paragraph (c) by removing "52.212-11" and inserting "52.211-18".

32. Subpart 12.5 is redesignated as Subpart 12.13 and sections 12.501 through 12.505 are redesignated as sections 12.1301 through 12.1305, respectively.

33. Part 12 is revised to read as follows:

PART 12—ACQUISITION OF COMMERCIAL ITEMS

Sec.

12.000 Scope of part.

12.001 Definition.

Subpart 12.1—Acquisition of Commercial Items—General

12.101 Policy.

12.102 Applicability.

Subpart 12.2—Special Requirements for the Acquisition of Commercial Items

12.201 General.

12.202 Market research and description of agency need.

12.203 Procedures for solicitation, evaluation, and award.

12.204 Solicitation/contract form.

12.205 Offers.

12.206 Use of past performance.

12.207 Contract type.

12.208 Contract quality assurance.

12.209 Pricing of commercial items when contracting by negotiation.

12.210 Contract financing.

12.211 Technical data.

12.212 Computer software.

12.213 Other customary commercial practices.

Subpart 12.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items

12.300 Scope of subpart.

12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

12.302 Tailoring of provisions and clauses for the acquisition of commercial items.

12.303 Contract format.

Subpart 12.4—Unique Requirements Regarding Terms and Conditions for Commercial Items

12.401 General.

12.402 Acceptance.

12.403 Termination.

12.404 Warranties.

Subpart 12.5—Applicability of Certain Laws to the Acquisition of Commercial Items

12.500 Scope of subpart.

12.501 Applicability.

12.502 Procedures.

12.503 Applicability of certain laws to Executive agency contracts for the acquisition of commercial items.

12.504 Applicability of certain laws to subcontracts for the acquisition of commercial items.

Subpart 12.6—Streamlined Procedures for Evaluation and Solicitation for Commercial Items

12.601 General.

12.602 Streamlined evaluation of offers.

12.603 Streamlined solicitation for commercial items.

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

12.000 Scope of part.

This part prescribes policies and procedures unique to the acquisition of commercial items. It implements the Federal Government's preference for the acquisition of commercial items contained in Title VIII of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355) by establishing acquisition policies more closely resembling those of the commercial marketplace and encouraging the acquisition of commercial items and components.

12.001 Definition.

Subcontract, as used in this part, includes, but is not limited to, a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or subcontractor.

Subpart 12.1—Acquisition of Commercial Items— General

12.101 Policy.

Agencies shall—

(a) Conduct market research to determine whether commercial items or

nondevelopmental items are available that could meet the agency's requirements;

(b) Acquire commercial items or nondevelopmental items when they are available to meet the needs of the agency; and

(c) Require prime contractors and subcontractors at all tiers to incorporate, to the maximum extent practicable, commercial items or nondevelopmental items as components of items supplied to the agency.

12.102 Applicability.

(a) This part shall be used for the acquisition of supplies or services that meet the definition of commercial items at section 2.101.

(b) Contracting officers shall use the policies in this part in conjunction with the policies and procedures for solicitation, evaluation and award prescribed in part 13, Simplified Acquisition Procedures; part 14, Sealed Bidding; or part 15, Contracting by Negotiation, as appropriate for the particular acquisition.

(c) Contracts for the acquisition of commercial items are subject to the policies in other parts of this chapter. When a policy in another part of this chapter is inconsistent with a policy in this part, this part 12 shall take precedence for the acquisition of commercial items.

(d) This part shall not apply to the acquisition of commercial items—

(1) At or below the micro-purchase threshold (see subpart 13.6);

(2) Using the SF 44 (see section 13.505-3);

(3) Using the imprest fund (see subpart 13.4); or

(4) Using the Governmentwide commercial purchase card (see subpart 13.6).

Subpart 12.2—Special Requirements for the Acquisition of Commercial Items

12.201 General.

Public Law 103-355 establishes special requirements for the acquisition of commercial items intended to more closely resemble those customarily used in the commercial marketplace. This subpart identifies those special requirements as well as other considerations necessary for proper planning, solicitation, evaluation and award of contracts for commercial items.

12.202 Market research and description of agency need.

(a) Market research (see 10.001) is an essential element of building an effective strategy for the acquisition of

commercial items and establishes the foundation for the agency description of need (see part 11), the solicitation, and resulting contract.

(b) The description of agency need must contain sufficient detail for potential offerors of commercial items to know which commercial products or services to offer. Generally, for acquisitions in excess of the simplified acquisition threshold, an agency's statement of need for a commercial item will describe the product or service to be acquired and explain how the agency intends to use the product or service in terms of function to be performed, performance requirement or essential physical characteristics. Describing the agency's need in these terms allows offerors to propose methods that will best meet the needs of the Government.

(c) Follow the procedures in subpart 11.2 regarding the identification and availability of specifications, standards and commercial item descriptions.

12.203 Procedures for solicitation, evaluation, and award.

Contracting officers shall use the policies unique to the acquisition of commercial items prescribed in this part in conjunction with the policies and procedures for solicitation, evaluation and award prescribed in part 13, Simplified Acquisition Procedures; part 14, Sealed Bidding; or part 15, Contracting by Negotiation, as appropriate for the particular acquisition. The contracting officer may use the streamlined procedure for soliciting offers for commercial items prescribed in 12.603.

12.204 Solicitation/contract form.

The Standard Form 1449, Solicitation/Contract/Order for Commercial Items, shall be used by the contracting officer when issuing written solicitations and awarding contracts and placing orders for commercial items. This form contains the information necessary for solicitations and contracts. The form may also be used for documenting receipt, inspection and acceptance of commercial items. Other forms shall not be used for solicitation or award of contracts or orders for the acquisition of commercial items.

12.205 Offers.

(a) Where technical information is necessary for evaluation of offers, agencies should, as part of market research, review existing product literature generally available in the industry to determine its adequacy for purposes of evaluation. If adequate, contracting officers shall request existing product literature from offerors

of commercial items in lieu of unique technical proposals.

(b) Contracting officers should allow offerors to propose more than one product that will meet a Government need in response to solicitations for commercial items. The contracting officer shall evaluate each product as a separate offer.

(c) Contracting officers may, considering the circumstances described in 5.203(b), allow fewer than 30 days response time for receipt of offers for commercial items.

12.206 Use of past performance.

Past performance should be an important element of every evaluation and contract award for commercial items. Contracting officers should consider past performance data from a wide variety of sources both inside and outside the Federal Government in accordance with the policies and procedures contained in subpart 9.1, section 13.106-1, or subpart 15.6, as applicable.

12.207 Contract type.

Agencies shall use firm-fixed-price contracts or fixed-price contracts with economic price adjustment for the acquisition of commercial items. Indefinite-delivery contracts (see subpart 16.5) may be used where the prices are established based on a firm-fixed-price or fixed-price with economic price adjustment. Use of any other contract type to acquire commercial items is prohibited.

12.208 Contract quality assurance.

Contracts for commercial items shall rely on contractors' existing quality assurance systems as a substitute for Government inspection and testing before tender for acceptance unless customary market practices for the commercial item being acquired include in-process inspection. Any in-process inspection by the Government shall be conducted in a manner consistent with commercial practice.

12.209 Pricing of commercial items when contracting by negotiation.

(a) When contracting by negotiation for commercial items, the policies and procedures in part 15 shall be used to establish the reasonableness of prices.

(b) The provisions and clauses prescribed in this part for the acquisition of commercial items do not include the provisions and clauses prescribed in part 15 because they assume prices for commercial items will either

(1) Not be subject to the Truth in Negotiations Act because the contract

price is below the dollar threshold for application of the Act; or

(2) Be based upon one of the exceptions to cost or pricing data requirements contained in 15.804–1(a)(1).

(c) If the contracting officer determines it is appropriate to use the commercial item exception to cost or pricing data requirements (see 15.804–1(a)(2)), the provisions and clauses prescribed in 15.804–8 and 15.106 for this purpose shall be inserted in an addendum to the solicitation and contract.

(d) If the contracting officer is required to obtain cost or pricing data (see 15.804–1(b)(4) and 15.804–2), the provisions and clauses prescribed in 15.804–8 and 15.106 for this purpose shall be inserted in an addendum to the solicitation and contract.

(e) When a contract is priced using the exceptions at 15.804–1(a)(1), no cost or pricing data may be obtained for modifications unless the proposed modification would change the contract from a contract for a commercial item to a contract for other than a commercial item (see 15.804–1(b)(6)). If the exceptions at 15.804–1(a)(1) are not used, the contracting officer may be required to obtain cost or pricing data to determine the reasonableness of prices for subsequent modifications (see 15.804–2(a)(1)) and the contracting officer shall insert the provisions and clauses prescribed for this purpose in an addendum to the solicitation and contract.

12.210 Contract financing.

Customary market practice for some commercial items may include buyer contract financing. The contracting officer may offer Government financing in accordance with the policies and procedures in part 32.

12.211 Technical data.

Except as provided by agency-specific statutes, the Government shall acquire only the technical data and the rights in that data customarily provided to the public with a commercial item or process. The contracting officer shall presume that data delivered under a contract for commercial items was developed exclusively at private expense. When a contract for commercial items requires the delivery of technical data, the contracting officer shall include appropriate provisions and clauses delineating the rights in the technical data in addenda to the solicitation and contract (see part 27 or agency FAR supplements).

12.212 Computer software.

(a) Commercial computer software or commercial computer software

documentation shall be acquired under licenses customarily provided to the public to the extent such licenses are consistent with Federal law and otherwise satisfy the Government's needs. Generally, offerors and contractors shall not be required to—

(1) Furnish technical information related to commercial computer software or commercial computer software documentation that is not customarily provided to the public; or

(2) Relinquish to, or otherwise provide, the Government rights to use, modify, reproduce, release, perform, display, or disclose commercial computer software or commercial computer software documentation except as mutually agreed to by the parties.

(b) With regard to commercial computer software and commercial computer software documentation, the Government shall have only those rights specified in the license contained in any addendum to the contract.

12.213 Other customary commercial practices.

It is customary practice in the commercial marketplace for both the buyer and seller to propose terms and conditions for a given transaction, each written from their particular perspectives. The terms and conditions prescribed in this part 12 seek to balance the interests of both the buyer and seller. These terms and conditions are generally appropriate for use in a wide range of acquisitions. However, market research may indicate other customary commercial practices that are appropriate for the acquisition of the particular item. These practices should be considered for incorporation into the solicitation and contract if the contracting officer determines them appropriate in concluding a business arrangement satisfactory to both parties and not otherwise precluded by law or executive order.

Subpart 12.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items

12.300 Scope of subpart.

This subpart establishes provisions and clauses to be used when acquiring commercial items.

12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

(a) In accordance with Section 8002 of Public Law 103–355 (41 U.S.C. 264, note), contracts for the acquisition of commercial items shall, to the maximum extent practicable, include only those clauses—

(1) Required to implement provisions of law or executive orders applicable to the acquisition of commercial items; or

(2) Determined to be consistent with customary commercial practice.

(b) To implement this Act, the contracting officer shall insert the following provisions in solicitations for the acquisition of commercial items, and clauses in solicitations and contracts for the acquisition of commercial items:

(1) The provision at 52.212–1, Instructions to Offerors—Commercial Items. This provision provides a single, streamlined set of instructions to be used when soliciting offers for commercial items and is incorporated in the solicitation by reference (see Block 26, SF 1449). The contracting officer may tailor these instructions or provide additional instructions tailored to the specific acquisition in accordance with 12.302;

(2) The provision at 52.212–3, Offeror Representations and Certifications—Commercial Items. This provision provides a single, consolidated list of certifications and representations for the acquisition of commercial items and is attached to the solicitation for offerors to complete and return with their offer. This provision may not be tailored except in accordance with Subpart 1.4;

(3) The clause at 52.212–4, Contract Terms and Conditions—Commercial Items. This clause includes terms and conditions which are, to the maximum extent practicable, consistent with customary commercial practices and is incorporated in the solicitation and contract by reference (see Block 26, SF 1449). The contracting officer may tailor this clause in accordance with 12.302; and

(4) The clause at 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items. This clause incorporates by reference only those clauses required to implement provisions of law or executive orders applicable to the acquisition of commercial items. The contracting officer shall attach this clause to the solicitation and contract and, using the appropriate clause prescriptions, indicate which, if any, of the additional clauses cited in 52.2125(b) or (c) are applicable to the specific acquisition. When cost information is obtained pursuant to part 15 to establish the reasonableness of prices for commercial items, the contracting officer shall insert the clauses prescribed for this purpose in an addendum to the solicitation and contract. This clause may not be tailored.

(c) When the use of evaluation factors is appropriate, the contracting officer may—

(1) Insert the provision at 52.212-2, Evaluation—Commercial Items, in solicitations for commercial items (see 12.602); or

(2) Include a similar provision containing all evaluation factors required by section 13.106-1, Subpart 14.2 or subpart 15.6, as an addendum (see 12.302(d)).

(d) *Use of required provisions and clauses.* Notwithstanding prescriptions contained elsewhere in the FAR, when acquiring commercial items, contracting officers shall be required to use only those provisions and clauses prescribed in this part. The provisions and clauses prescribed in this part shall be revised, as necessary, to reflect the applicability of statutes and executive orders to the acquisition of commercial items.

(e) *Discretionary use of FAR provisions and clauses.* The contracting officer may include in solicitations and contracts by addendum other FAR provisions and clauses when their use is consistent with the limitations contained in 12.302. For example:

(1) The contracting officer may include appropriate clauses when an indefinite-delivery type of contract will be used. The clauses prescribed at 16.505 may be used for this purpose.

(2) The contracting officer may include appropriate provisions and clauses when the use of options is in the Government's interest. The provisions and clauses prescribed in 17.208 may be used for this purpose. If the provision at 52.212-2 is used, paragraph (b) provides for the evaluation of options.

(3) The contracting officer may use the provisions and clauses contained in part 23 regarding the use of recovered material when appropriate for the item being acquired.

(f) Agencies may supplement the provisions and clauses prescribed in this part (to require use of additional provisions and clauses) only as necessary to reflect agency unique statutes applicable to the acquisition of commercial items or as may be approved by the agency senior procurement executive, or the individual responsible for representing the agency on the FAR Council, without power of delegation.

12.302 Tailoring of provisions and clauses for the acquisition of commercial items.

(a) *General.* The provisions and clauses established in this subpart are intended to address, to the maximum extent practicable, customary commercial market practices for a wide range of potential Government

acquisitions of commercial items. However, because of the broad range of commercial items acquired by the Government, variations in customary commercial practices across markets and the relative volume of the Government's acquisitions in the specific market, contracting officers may, within the limitations of this subpart, and after conducting appropriate market research, tailor the provision at 52.212-1, Instructions to Offerors—Commercial Items, and the clause at 52.212-4, Contract Terms and Conditions—Commercial Items, to adapt to the market conditions for each acquisition.

(b) *Tailoring 52.212-4, Contract Terms and Conditions—Commercial Items.* The following paragraphs of the clause at 52.212-4, Contract Terms and Conditions—Commercial Items, implement statutory requirements and shall not be tailored—

- (1) Assignments;
- (2) Disputes;
- (3) Payment;
- (4) Invoice;
- (5) Other compliances; and
- (6) Compliance with laws unique to Government contracts.

(c) *Tailoring inconsistent with customary commercial practice.* The contracting officer shall not tailor any clause or otherwise include any additional terms or conditions in a solicitation or contract for commercial items in a manner that is inconsistent with customary commercial practice for the item being acquired unless a waiver is approved in accordance with agency procedures. The request for waiver must describe the customary commercial practice found in the marketplace, support the need to include a term or condition that is inconsistent with that practice and include a determination that use of the customary commercial practice is inconsistent with the needs of the Government. A waiver may be requested for an individual or class of contracts for that specific item.

(d) Tailoring shall be by addenda to the solicitation and contract. The contracting officer shall indicate in Block 26 of the SF 1449 if addenda are attached. These addenda may include, for example, a continuation of the schedule of supplies/services to be acquired from blocks 18 through 21 of the SF 1449; a continuation of the description of the supplies/services being acquired; further elaboration of any other item(s) on the SF 1449; any other terms or conditions necessary for the performance of the proposed contract (such as options, ordering procedures for indefinite-delivery type

contracts, warranties, contract financing arrangements, etc.).

12.303 Contract format.

Solicitations and contracts for the acquisition of commercial items prepared using this part 12 shall be assembled, to the maximum extent practicable, using the following format:

- (a) Standard Form (SF) 1449;
- (b) Continuation of any block from SF 1449, such as—
 - (1) Block 10 if set-aside for emerging small businesses;
 - (2) Block 16B for remittance address;
 - (3) Block 18 for contract line item numbers;
 - (4) Block 19 for schedule of supplies/services; or
 - (5) Block 24 for accounting data;
- (c) Contract clauses—
 - (1) 52.212-4, Contract Terms and Conditions—Commercial Items, by reference (see SF 1449, Block 26);
 - (2) Any addendum to 52.212-4; and
 - (3) 52.212-5, Contract Terms and Conditions Required to Implement Statutes and Executive Orders;
- (d) Any contract documents, exhibits or attachments; and
- (e) Solicitation provisions—
 - (1) 52.212-1, Instructions to Offerors—Commercial Items, by reference (see SF 1449, Block 26);
 - (2) Any addendum to 52.212-1;
 - (3) 52.212-2, Evaluation—Commercial Items, or other description of evaluation factors for award, if used; and
 - (4) 52.212-3, Offeror Representations and Certifications—Commercial Items.

Subpart 12.4—Unique Requirements Regarding Terms and Conditions for Commercial Items

12.401 General.

This subpart provides—

(a) Guidance regarding tailoring of the paragraphs in the clause at 52.212-4, Contract Terms and Conditions—Commercial Items, when the paragraphs do not reflect the customary practice for a particular market; and

(b) Guidance on the administration of contracts for commercial items in those areas where the terms and conditions in 52.212-4 differ substantially from those contained elsewhere in the FAR.

12.402 Acceptance.

(a) The acceptance paragraph in 52.212-4 is based upon the assumption that the Government will rely on the contractor's assurances that the commercial item tendered for acceptance conforms to the contract requirements. The Government inspection of commercial items will not

prejudice its other rights under the acceptance paragraph. Additionally, although the paragraph does not address the issue of rejection, the Government always has the right to refuse acceptance of nonconforming items. This paragraph is generally appropriate when the Government is acquiring noncomplex commercial items.

(b) Other acceptance procedures may be more appropriate for the acquisition of complex commercial items or commercial items used in critical applications. In such cases, the contracting officer shall include alternative inspection procedure(s) in an addendum and ensure these procedures and the postaward remedies adequately protect the interests of the Government. The contracting officer must carefully examine the terms and conditions of any express warranty with regard to the effect it may have on the Government's available postaward remedies (see 12.404).

(c) The acquisition of commercial items under other circumstances such as on an "as is" basis may also require acceptance procedures different from those contained in 52.212-4. The contracting officer should consider the effect the specific circumstances will have on the acceptance paragraph as well as other paragraphs of the clause.

12.403 Termination.

(a) *General.* The clause at 52.212-4 permits the Government to terminate a contract for commercial items either for the convenience of the Government or for cause. However, the paragraphs in 52.212-4 entitled "Termination for the Government's Convenience" and "Termination for Cause" contain concepts which differ from those contained in the termination clauses prescribed in part 49. Consequently, the requirements of part 49 do not apply when terminating contracts for commercial items and contracting officers shall follow the procedures in this section. Contracting officers may continue to use part 49 as guidance to the extent that part 49 does not conflict with this section and the language of the termination paragraphs in 52.212-4.

(b) *Policy.* The contracting officer should exercise the Government's right to terminate a contract for commercial items either for convenience or for cause only when such a termination would be in the best interests of the Government. The contracting officer should consult with counsel prior to terminating for cause.

(c) *Termination for cause.* (1) The paragraph in 52.2124 entitled "Excusable Delay" requires contractors notify the contracting officer as soon as

possible after commencement of any excusable delay. In most situations, this requirement should eliminate the need for a show cause notice prior to terminating a contract. The contracting officer shall send a cure notice prior to terminating a contract for a reason other than late delivery.

(2) The Government's rights after a termination for cause shall include all the remedies available to any buyer in the marketplace. The Government's preferred remedy will be to acquire similar items from another contractor and to charge the defaulted contractor with any excess procurement costs together with any incidental or consequential damages incurred because of the termination.

(3) When a termination for cause is appropriate, the contracting officer shall send the contractor a written notification regarding the termination. At a minimum, this notification shall—

- (i) Indicate the contract is terminated for cause;
- (ii) Specify the reasons for the termination;
- (iii) Indicate which remedies the Government intends to seek or provide a date by which the Government will inform the contractor of the remedy; and
- (iv) State that the notice constitutes a final decision of the contracting officer and that the contractor has the right to appeal under the Disputes clause (see 33.211).

(d) *Termination for the Government's convenience.* (1) When the contracting officer terminates a contract for commercial items for the Government's convenience, the contractor shall be paid—

- (i) The percentage of the contract price reflecting the percentage of the work performed prior to the notice of the termination, and
- (ii) Any charges the contractor can demonstrate directly resulted from the termination. The contractor may demonstrate such charges using its standard record keeping system and is not required to comply with the cost accounting standards or the contract cost principles in part 31. The Government does not have any right to audit the contractor's records solely because of the termination for convenience.

(2) Generally, the parties should mutually agree upon the requirements of the termination proposal. The parties must balance the Government's need to obtain sufficient documentation to support payment to the contractor against the goal of having a simple and expeditious settlement.

12.404 Warranties.

(a) *Implied warranties.* The Government's post award rights contained in 52.212-4 are the implied warranty of merchantability, the implied warranty of fitness for particular purpose and the remedies contained in the acceptance paragraph.

(1) The implied warranty of merchantability provides that an item is reasonably fit for the ordinary purposes for which such items are used. The items must be of at least average, fair or medium-grade quality and must be comparable in quality to those that will pass without objection in the trade or market for items of the same description.

(2) The implied warranty of fitness for a particular purpose provides that an item is fit for use for the particular purpose for which the Government will use the items. The Government can rely upon an implied warranty of fitness for particular purpose when—

- (i) The seller knows the particular purpose for which the Government intends to use the item; and
- (ii) The Government relied upon the contractor's skill and judgment that the item would be appropriate for that particular purpose.

(3) Contracting officers should consult with legal counsel prior to asserting any claim for a breach of an implied warranty.

(b) *Express warranties.* The Federal Acquisition Streamlining Act of 1994 (41 U.S.C. 264 note) requires contracting officers to take advantage of commercial warranties. To the maximum extent practicable, solicitations for commercial items shall require offerors to offer the Government at least the same warranty terms, including offers of extended warranties, offered to the general public in customary commercial practice. Solicitations may specify minimum warranty terms, such as minimum duration, appropriate for the Government's intended use of the item.

(1) Any express warranty the Government intends to rely upon must meet the needs of the Government. The contracting officer should analyze any commercial warranty to determine if—

(i) The warranty is adequate to protect the needs of the Government, e.g., items covered by the warranty and length of warranty;

(ii) The terms allow the Government effective postaward administration of the warranty to include the identification of warranted items, procedures for the return of warranted items to the contractor for repair or replacement, and collection of product performance information; and

(iii) The warranty is cost-effective.

(2) In some markets, it may be customary commercial practice for contractors to exclude or limit the implied warranties contained in 52.212-4 in the provisions of an express warranty. In such cases, the contracting officer shall ensure that the express warranty provides for the repair or replacement of defective items discovered within a reasonable period of time after acceptance.

(3) Express warranties shall be included in the contract by addendum (see 12.302).

Subpart 12.5—Applicability of Certain Laws to the Acquisition of Commercial Items

12.500 Scope of subpart.

As required by Section 34 of the Office of Federal Procurement Policy Act (41 U.S.C. 430), this subpart lists provisions of laws that are not applicable to contracts for the acquisition of commercial items, or are not applicable to subcontracts, at any tier, for the acquisition of a commercial item. This subpart also lists provisions of law that have been amended to eliminate or modify their applicability to either contracts or subcontracts for the acquisition of commercial items.

12.501 Applicability.

(a) This subpart applies to any contract or subcontract at any tier for the acquisition of commercial items.

(b) Nothing in this subpart shall be construed to authorize the waiver of any provision of law with respect to any subcontract if the prime contractor is reselling or distributing commercial items of another contractor without adding value. This limitation is intended to preclude establishment of unusual contractual arrangements solely for the purpose of Government sales.

(c) For purposes of this subpart, contractors awarded subcontracts under subpart 19.8, Contracting with the Small Business Administration (the 8(a) Program), shall be considered prime contractors.

12.502 Procedures.

(a) The FAR prescription for the provision or clause for each of the laws listed in 12.503 has been revised in the appropriate part to reflect its proper application to prime contracts for the acquisition of commercial items.

(b) For subcontracts for the acquisition of commercial items or commercial components, the clauses at 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items, and 52.244-6,

Subcontracts for Commercial Items and Commercial Components, reflect the applicability of the laws listed in 12.504 by identifying the only provisions and clauses that are required to be included in a subcontract at any tier for the acquisition of commercial items or commercial components.

12.503 Applicability of certain laws to executive agency contracts for the acquisition of commercial items.

(a) The following laws are not applicable to executive agency contracts for the acquisition of commercial items:

(1) 41 U.S.C. 43, Walsh-Healey Act (see subpart 22.6).

(2) 41 U.S.C. 254(a) and 10 U.S.C. 2306(b), Contingent Fees (see 3.404).

(3) 41 U.S.C. 416(a)(6), Minimum Response Time for Offers under Office of Federal Procurement Policy Act (see 5.203).

(4) 41 U.S.C. 701, *et seq.*, Drug-Free Workplace Act of 1988 (see 23.501).

(b) Certain requirements of the following laws have been eliminated for executive agency contracts for the acquisition of commercial items:

(1) 33 U.S.C. 1368, Requirement for a certificate and clause under the Federal Water Pollution Control Act (see 23.105).

(2) 40 U.S.C. 327 *et seq.*, Requirement for a certificate and clause under the Contract Work Hours and Safety Standards Act (see 22.305).

(3) 41 U.S.C. 57(a) and (b), and 58, Requirement for a clause and certain other requirements related to the Anti-Kickback Act of 1986 (see 3.502).

(4) 41 U.S.C. 423(e)(1)(B), Requirement for a certain certification under the Procurement Integrity Act (see 3.104-9).

(5) 42 U.S.C. 7606, Requirements for a certificate and clause under the Clean Air Act (see 23.105).

(6) 49 U.S.C. 40118, Requirement for a certificate and clause under the Fly American provisions (see 47.405).

(c) The applicability of the following laws have been modified in regards to Executive agency contracts for the acquisition of commercial items:

(1) 41 U.S.C. 253g and 10 U.S.C. 2402, Prohibition on Limiting Subcontractor Direct Sales to the United States (see 3.503).

(2) 41 U.S.C. 254(d) and 10 U.S.C. 2306a, Truth in Negotiations Act (see 15.804).

(3) 41 U.S.C. 422, Cost Accounting Standards (see 48 CFR chapter 99).

12.504 Applicability of certain laws to subcontracts for the acquisition of commercial items.

(a) The following laws are not applicable to subcontracts at any tier for

the acquisition of commercial items or commercial components at any tier:

(1) 15 U.S.C. 644(d), Requirements relative to labor surplus areas under the Small Business Act (see subpart 19.2).

(2) 19 U.S.C. 1202, Tariff Act of 1930 (see subpart 25.6).

(3) 19 U.S.C. 1309, Supplies for Certain Vessels and Aircraft (see subpart 25.6).

(4) 19 U.S.C. 2701, *et seq.*, Authority to Grant Duty Free Treatment (see subpart 25.6).

(5) 31 U.S.C. 1352, Limitation on Payments to Influence Certain Federal Transactions (see subpart 3.8).

(6) 41 U.S.C. 43, Walsh-Healey Act (see subpart 22.6).

(7) 41 U.S.C. 253d, Validation of Proprietary Data Restrictions (see subpart 27.4).

(8) 41 U.S.C. 254(a) and 10 U.S.C. 2306(b), Contingent Fees (see subpart 3.4).

(9) 41 U.S.C. 254d(c) and 10 U.S.C. 2313(c), Examination of Records of Contractor, when a subcontractor is not required to provide cost or pricing data (see subpart 15.1).

(10) 41 U.S.C. 351, Service Contract Act of 1965, as amended (see subpart 22.10).

(11) 41 U.S.C. 416(a)(6), Minimum Response Time for Offers under Office of Federal Procurement Policy Act (see subpart 5.2).

(12) 41 U.S.C. 418a, Rights in Technical Data (see subpart 27.4).

(13) 41 U.S.C. 701, *et seq.*, Drug-Free Workplace Act of 1988 (see subpart 23.5).

(14) 46 U.S.C. 1241(b), Transportation in American Vessels of Government Personnel and Certain Cargo (see subpart 47.5) (inapplicability effective May 1, 1996).

(15) 49 U.S.C. 40118, Fly American provisions (see subpart 47.4).

(16) Public Law 90-469, William Langer Jewel Bearing Plant Special Act (see subpart 8.2).

(b) Certain requirements of the following laws have been eliminated for subcontracts at any tier for the acquisition of commercial items or commercial components:

(1) 33 U.S.C. 1368, Requirement for a certificate and clause under the Federal Water Pollution Control Act (see subpart 23.1).

(2) 40 U.S.C. 327, *et seq.*, Requirement for a certificate and clause under the Contract Work Hours and Safety Standards Act (see subpart 22.3).

(3) 41 U.S.C. 423(e)(1)(B), Requirement for certain certifications under the Procurement Integrity Act (see subpart 3.1).

(4) 42 U.S.C. 7606, Requirements for a certificate and clause under the Clean Air Act (see subpart 23.1).

(c) The applicability of the following laws have been modified in regards to subcontracts at any tier for the acquisition of commercial items or commercial components:

(1) 41 U.S.C. 253g and 10 U.S.C. 2402, Prohibition on Limiting Subcontractor Direct Sales to the United States (see subpart 3.5).

(2) 41 U.S.C. 254(d) and 10 U.S.C. 2306a, Truth in Negotiations Act (see subpart 15.8).

(3) 41 U.S.C. 422, Cost Accounting Standards (see 48 CFR chapter 99).

Subpart 12.6—Streamlined Procedures for Evaluation and Solicitation for Commercial Items

12.601 General.

This subpart provides optional procedures for—

(a) Streamlined evaluation of offers for commercial items; and

(b) Streamlined solicitation of offers for commercial items for use where appropriate.

These procedures are intended to simplify the process of preparing and issuing solicitations, and evaluating offers for commercial items consistent with customary commercial practices.

12.602 Streamlined evaluation of offers.

(a) When evaluation factors are used, the contracting officer may insert a provision substantially the same as the provision at 52.212-2, Evaluation—Commercial Items, in solicitations for commercial items or comply with the procedures in 13.106-1 if the acquisition is being made using the procedures in part 13. When the provision at 52.212-2 is used, paragraph (a) of the provision shall be tailored to the specific acquisition to describe the evaluation factors and relative importance of those factors. This provision contemplates an approach designed to select the source whose offer will provide the Government with the greatest value in terms of performance and other factors. Other methods of evaluation and basis for award may be more appropriate for a given acquisition.

(b) Offers shall be evaluated in accordance with the criteria contained in the solicitation. For many commercial items, the criteria need not be more detailed than technical (capability of the item offered to meet the agency need), price and past performance. Technical capability may be evaluated by how well the proposed products meet the Government

requirement instead of predetermined subfactors. Solicitations for commercial items do not have to contain subfactors for technical capability when the solicitation adequately describes the item's intended use. A technical evaluation would normally include examination of such things as product literature, product samples (if requested), technical features and warranty provisions. Past performance shall be evaluated in accordance with the procedures in section 13.106-1 or subpart 15.6, as applicable. The contracting officer shall ensure the instructions provided in the provision at 52.212-1, Instructions to Offerors—Commercial Items, and the evaluation criteria provided in the provision at 52.212-2, Evaluation—Commercial Items, are in agreement.

(c) Select the offer that is most advantageous to the Government based on the factors contained in the solicitation. Fully document the rationale for selection of the successful offeror including discussion of any tradeoffs considered.

12.603 Streamlined solicitation for commercial items.

(a) When a written solicitation will be issued, the contracting officer may use the following procedure to reduce the time required to solicit and award contracts for the acquisition of commercial items. This procedure combines the Commerce Business Daily (CBD) synopsis required by 5.203 and the issuance of the solicitation into a single document with the following limitations:

(1) Section 5.207 limits submissions to the CBD to 12,000 textual characters (approximately 3 1/2 single-spaced pages).

(2) This combined CBD synopsis/solicitation is only appropriate where the solicitation is relatively simple and is not recommended for use when lengthy addenda to the solicitation are necessary.

(b) When using the combined synopsis/solicitation procedure, the SF 1449 is not used for issuing the solicitation.

(c) To use these procedures, the contracting officer shall—

(1) Prepare the synopsis as described at 5.207 for items 1-16.

(2) In item 17, Description, include the following additional information:

(i) The following statement:

This is a combined synopsis/solicitation for commercial items prepared in accordance with the format in FAR Subpart 12.6, as supplemented with additional information included in this notice. This announcement constitutes the only solicitation; proposals

are being requested and a written solicitation will not be issued.

(ii) The solicitation number and a statement that the solicitation is issued as an invitation to bid (IFB), request for quotation (RFQ) or request for proposal (RFP).

(iii) A statement that the solicitation document and incorporated provisions and clauses are those in effect through Federal Acquisition Circular ____.

(iv) A notice regarding any set-aside and the associated standard industrial classification code and small business size standard. Also include a statement regarding the Small Business Competitiveness Demonstration Program, if applicable.

(v) A list of contract line item number(s) and items, quantities and units of measure, (including option(s), if applicable).

(vi) Description of requirements for the items to be acquired.

(vii) Date(s) and place(s) of delivery and acceptance and FOB point.

(viii) A statement that the provision at 52.212-1, Instructions to Offerors—Commercial, applies to this acquisition and a statement regarding any addenda to the provision.

(ix) A statement regarding the applicability of the provision at 52.212-2, Evaluation—Commercial Items, if used, and the specific evaluation criteria to be included in paragraph (a) of that provision. If this provision is not used, describe the evaluation procedures to be used.

(x) A statement advising offerors to include a completed copy of the provision at 52.212-3, Offeror Representations and Certifications—Commercial Items, with its offer.

(xi) A statement that the clause at 52.212-4, Contract Terms and Conditions—Commercial Items, applies to this acquisition and a statement regarding any addenda to the clause.

(xii) A statement that the clause at 52.212-5, Contract Terms and Conditions Required To Implement Statutes Or Executive Orders—Commercial Items, applies to this acquisition and a statement regarding which, if any, of the additional FAR clauses cited in the clause are applicable to the acquisition.

(xiii) A statement regarding any additional contract requirement(s) or terms and conditions (such as contract financing arrangements, warranty requirements or GSA Delegation of Procurement Authority (DPA) case number (see 48 CFR 201-39.106-4)) determined by the contracting officer to be necessary for this acquisition and consistent with customary commercial practices.

(xiv) A statement regarding the Defense Priorities and Allocations System (DPAS) and assigned rating, if applicable.

(xv) A statement regarding any applicable Commerce Business Daily numbered notes.

(xvi) The date, time and place offers are due.

(xvii) The name and telephone number of the individual to contact for information regarding the solicitation.

(3) Allow response time for receipt of offers as follows:

(i) Because the CBD synopsis and solicitation are contained in a single document, it is not necessary to publish a separate CBD synopsis 15 days before the issuance of the solicitation.

(ii) When using the combined CBD synopsis/solicitation, contracting officers shall establish a response time in accordance with 5.203(b), but shall allow at least 15 days response time from the date the notice is published in the CBD.

(4) Publish amendments to solicitations in the same manner as the initial synopsis/solicitation.

PART 14—SEALED BIDDING

14.201-2 [Amended]

34. Section 14.201-2 is amended in the parenthetical of paragraphs (b) and (c) by removing “part 10, Specifications, Standards, and Other Product Descriptions” and inserting “part 11” in its place; in paragraph (d) by removing “(see 10.004(e))”; and in the parenthetical of paragraph (f) by revising the parenthetical to read “(see subpart 11.4, Delivery or Performance Schedules).”

14.404-1 [Amended]

35. Section 14.404-1 is amended in paragraph (b) by removing “10.008” and inserting “11.201”.

PART 15—CONTRACTING BY NEGOTIATION

15.406-2 [Amended]

36. Section 15.406-2 is amended in the parenthetical of paragraph (c) by removing “part 10, Specifications, Standards, and Other Product Descriptions” and inserting “part 11”; in paragraph (d) by removing “(see 10.004(e))”; and in paragraph (f) by revising the parenthetical to read “(subpart 11.4, Delivery or Performance Schedules, and 47.301-1).”

37. Section 15.501 is amended by revising the definition “Commercial product offer” to read as follows:

15.501 Definitions.

* * * * *

Commercial item offer means an offer of a commercial item the vendor wishes to see introduced in the Government’s supply system as an alternate or replacement for an existing supply item.

* * * * *

15.503 [Amended]

38. Section 15.503 is amended in paragraph (b) by removing the word “product” and inserting “item”.

39. Section 15.704 is amended by revising the second sentence to read as follows:

15.704 Items and work included.

* * * Raw materials, commercial items (see 2.101), and off-the-shelf items (see 46.101) shall not be included, unless their potential impact on contract cost or schedule is critical. * * *

PART 16—TYPES OF CONTRACTS

40. Section 16.201 is amended by adding a sentence at the end of the paragraph to read as follows:

16.201 General.

* * * The contracting officer shall use firm-fixed-price or fixed-price with economic price adjustment contracts when acquiring commercial items.

41. Section 16.202-2 is amended by revising the introductory paragraph to read as follows:

16.202-2 Application.

A firm-fixed-price contract is suitable for acquiring commercial items (see parts 2 and 12) or for acquiring other supplies or services on the basis of reasonably definite functional or detailed specifications (see part 11) when the contracting officer can establish fair and reasonable prices at the outset, such as when—

* * * * *

42. Section 16.301-3 is amended by redesignating paragraphs (a) through (c) as paragraph (a)(1) through (a)(3), respectively; designating the introductory text as paragraph (a) introductory text and adding new (b) to read as follows:

16.301-3 Limitations.

* * * * *

(b) The use of cost-reimbursement contracts is prohibited for the acquisition of commercial items (see parts 2 and 12).

16.603-2 [Amended]

43. Section 16.603-2 is amended in paragraph (e) by removing “12.304” and inserting “11.604”.

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

44. Section 22.305 is amended by redesignating paragraph (g) as (h) and adding a new paragraph (g) to read as follows:

22.305 Contract clause.

* * * * *

(g) Contracts for commercial items (see parts 2 and 12).

* * * * *

45. Section 22.604-1 is amended by revising paragraph (a) to read as follows:

22.604-1 Statutory exemptions.

* * * * *

(a) Any item in those situations where the contracting officer is authorized by the express language of a statute to purchase “in the open market” generally (such as commercial items, see part 12); or where a specific purchase is made under the conditions described in 6.302-2 in circumstances where immediate delivery is required by the public exigency.

* * * * *

PART 23—ENVIRONMENTAL, CONSERVATION, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

46. Section 23.104 is amended in paragraph (a)(1) by removing the word “or” the second time it is used; in paragraph (a)(2) by removing the period and inserting “; or” and adding paragraph (a)(3) to read as follows:

23.104 Exemptions.

(a) * * * (3) for commercial items.

* * * * *

47. Section 23.501 is amended by redesignating paragraphs (b) through (d) as (c) through (e) and adding a new paragraph (b) to read as follows:

23.501 Applicability.

* * * * *

(b) Contracts for the acquisition of commercial items (see part 12);

* * * * *

PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

31.106-3 [Amended]

48. Section 31.106-3 is amended in the section heading and the first sentence of the undesignated paragraph by removing the word “products” and inserting “items” in their place.

PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS**36.202 [Amended]**

49. Section 36.202 is amended in paragraph (a) by removing “part 10” and inserting “part 11” in its place.

36.206 [Amended]

50. Section 36.206 is amended by removing “12.202” and inserting “11.502”.

36.303 [Amended]

51. Section 36.303 is amended in paragraph (c)(4) by removing “12.1” and inserting “11.4”.

PART 42—CONTRACT ADMINISTRATION**42.1105 [Amended]**

53. Section 42.1105 is amended by removing the reference “subpart 12.3” and inserting “subpart 11.6”.

Subpart 42.13—[Redesignated from Subpart 12.5]**42.1304 [Amended]**

54. and 55. Newly redesignated section 42.1304 (redesignated from 12.504) is amended in paragraph (a) by removing “52.212–15” and inserting “52.242–17”; and at the end of paragraph (d) by removing the period and inserting “, or information other than cost or pricing data.” in its place.

42.1305 [Amended]

56. Newly redesignated section 42.1305 (redesignated from 12.505) is amended in paragraph (a) by removing “52.212–12” and inserting “52.24214”; in paragraph (b)(1) by removing “52.212–13” and inserting “52.242–15”; in paragraph (c) by removing “52.21214” and inserting “52.242–16”; and in paragraph (d) by removing “52.212–15” and inserting “52.242–17”.

PART 44—SUBCONTRACTING POLICIES AND PROCEDURES

57. Subpart 44.4, consisting of sections 44.400 through 44.403, is added to read as follows:

Subpart 44.4—Subcontracts for Commercial Items and Commercial Components

Sec.

44.400 Scope of subpart.

44.401 Applicability.

44.402 Policy requirements.

44.403 Contract clause.

Subpart 44.4—Subcontracts for Commercial Items and Commercial Components**44.400 Scope of subpart.**

This subpart prescribes the policies limiting the contract clauses a prime contractor may be required to apply to any subcontractors that are furnishing commercial items or commercial components in accordance with Section 8002(b)(2) (Public Law 103–355).

44.401 Applicability.

This subpart applies to all contracts and subcontracts. For the purpose of this subpart, the term “subcontract” has the same meaning as defined in part 12.

44.402 Policy requirements.

(a) Contractors and subcontractors at all tiers shall, to the maximum extent practicable:

(1) Be required to incorporate commercial items or nondevelopmental items as components of items delivered to the Government; and

(2) Not be required to apply to any of its divisions, subsidiaries, affiliates, subcontractors or suppliers that are furnishing commercial items or commercial components any clause, except those—

(i) Required to implement provisions of law or executive orders applicable to subcontractors furnishing commercial items or commercial components; or

(ii) Determined to be consistent with customary commercial practice for the item being acquired.

(b) The clause at 52.244–6, Subcontracts for Commercial Items and Commercial Components, implements the policy in paragraph (a) of this section. Notwithstanding any other clause in the prime contract, only those clauses identified in the clause at 52.244–6 are required to be in subcontracts for commercial items or commercial components.

(c) Agencies may supplement the clause at 52.244–6 only as necessary to reflect agency unique statutes applicable to the acquisition of commercial items.

44.403 Contract clause.

The contracting officer shall insert the clause at 52.244–6, Subcontracts for Commercial Items and Commercial Components, in solicitations and contracts for supplies or services other than commercial items.

PART 46—QUALITY ASSURANCE

58. Section 46.101 is amended by adding in alphabetical order the definition “Commercial item” to read as follows:

46.101 Definitions.

* * * * *

Commercial item (see 2.101).

* * * * *

59. Section 46.102 is amended in paragraph (e) by removing “and”; by redesignating paragraph (f) as (g) and adding a new paragraph (f) to read as follows:

46.102 Policy.

* * * * *

(f) Contracts for commercial items shall rely on a contractor's existing quality assurance system as a substitute for compliance with Government inspection and testing before tender for acceptance unless customary market practices for the commercial item being acquired permit in-process inspection (Section 8002 of Public Law 103–355). Any in-process inspection by the Government shall be conducted in a manner consistent with commercial practice; and

* * * * *

46.202 [Amended]

60. Section 46.202 is amended by removing “three” and inserting “four”.

61. Sections 46.202–1 through 46.202–3 are redesignated as 46.202–2 through 46.202–4 and a new 46.202–1 is added to read as follows:

46.202–1 Contracts for commercial items.

When acquiring commercial items (see part 12), the Government shall rely on contractors' existing quality assurance systems as a substitute for Government inspection and testing before tender for acceptance unless customary market practices for the commercial item being acquired include in-process inspection. Any in-process inspection by the Government shall be conducted in a manner consistent with commercial practice.

46.202–2 [Amended]

62. Newly redesignated section 46.202–2 is amended in paragraph (b)(1) by removing “(see 46.204 and Table 46–1)”.

46.202–4 [Amended]

63. Newly redesignated section 46.202–4 is amended in paragraph (a)(1) by removing “(see 46.204 and Table 46–1)”.

64. Section 46.203 is amended by revising paragraph (a)(1); at the end of paragraph (a)(2) by removing “;or” and inserting a period; and by removing paragraph (a)(3). The revised text reads as follows:

46.203 Criteria for use of contract quality requirements.

* * * * *

(a) * * *

(1) Commercial (described in commercial catalogs, drawings, or industrial standards; see part 2); or

* * * * *

46.204 [Removed and reserved]

65. Section 46.204 and Table 46-1 are removed.

46.301 [Amended]

66. Section 46.301 is amended by removing "46.202-1(b)" and inserting "46.202-2(b)" in its place.

46.311 and 46.402 [Amended]

67. Sections 46.311 and 46.402(e) are amended by removing "46.202-3" and inserting "46.202-4" in their place.

46.404 [Amended]

68. Section 46.404 is amended at the end of paragraph (a) by removing "46.202-1" and inserting "46.202-2" in its place; in paragraph (b) introductory text by removing "46.202-1(b)" and inserting "46.202-2(b)" in its place; and in paragraph (b)(2) by removing the last sentence.

69. Section 46.709 is revised to read as follows:

46.709 Warranties of commercial items.

The contracting officer should take advantage of commercial warranties, including extended warranties, where appropriate and in the Government's best interests, offered by the contractor for the repair and replacement of commercial items (see part 12).

70. Section 46.710 is amended by revising the first sentence of the introductory paragraph; by removing paragraphs (a)(2) and (b)(2) and redesignating paragraphs (a)(3) through (a)(6) as (a)(2) through (a)(5), and paragraphs (b)(3) through (b)(5) as (b)(2) through (b)(4), respectively. The revised text reads as follows:

46.710 Contract clauses.

The clauses and alternates prescribed in this section may be used in solicitations and contracts in which inclusion of a warranty is appropriate (see 46.709 for warranties for commercial items). * * *

* * * * *

PART 47—TRANSPORTATION

71. Section 47.405 is amended by revising the last sentence to read as follows:

47.405 Contract clause.

* * * This clause does not apply to contracts awarded using the simplified acquisition procedures in part 13 or contracts for commercial items (see part 12).

72. Section 47.504 is amended by adding paragraph (e) to read as follows:

47.504 Exceptions.

* * * * *

(e) Beginning May 1, 1996, subcontracts for the acquisition of commercial items or commercial components (see 12.504(a)(13)). This exception does not apply to grants-in-aid shipments, such as agricultural and food-aid shipments, to shipments covered under Export-Import Bank loans or guarantees, and to subcontracts under Government contracts or agreements for ocean transportation services.

PART 49—TERMINATION OF CONTRACTS

49.402-7 [Amended]

73. Section 49.402-7 is amended in the last sentence of paragraph (a) by removing "52.212-4" and inserting "52.211-11" in its place.

74. Section 49.501 is revised to read as follows:

49.501 General.

This subpart prescribes the principal contract termination clauses. For contracts for the acquisition of commercial items, this part provides administrative guidance which may be followed when it is consistent with the requirements and procedures in the clause at 52.212-4, Contract Terms and Conditions—Commercial Items. In appropriate cases, agencies may authorize the use of special purpose clauses, if consistent with this chapter.

49.607 [Amended]

75. Section 49.607 is amended by removing from the introductory text "12.5" and inserting "42.13".

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

76. Section 52.202-1 is amended by revising the date of the clause; by redesignating paragraphs (b) and (c) as (f) and (g), and adding new paragraphs (b), (c), (d), and (e) to read as follows:

52.202-1 Definitions.

* * * * *

Definitions (Oct. 1995)

* * * * *

(b) *Commercial component* means any component that is a commercial item.

(c) *Commercial item* means—

(1) Any item, other than real property, that is of a type customarily used for nongovernmental purposes and that—

(i) Has been sold, leased, or licensed to the general public; or

(ii) Has been offered for sale, lease, or license to the general public;

(2) Any item that evolved from an item described in paragraph (c)(1) of this clause through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation;

(3) Any item that would satisfy a criterion expressed in paragraphs (c)(1) or (c)(2) of this clause, but for—

(i) Modifications of a type customarily available in the commercial marketplace; or

(ii) *Minor* modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements. "Minor" modifications means modifications that do not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process. Factors to be considered in determining whether a modification is minor include the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor;

(4) Any combination of items meeting the requirements of paragraphs (c)(1), (2), (3), or (5) of this clause that are of a type customarily combined and sold in combination to the general public;

(5) Installation services, maintenance services, repair services, training services, and other services if such services are procured for support of an item referred to in paragraphs (c)(1), (2), (3), or (4) of this clause, and if the source of such services—

(i) Offers such services to the general public and the Federal Government contemporaneously and under similar terms and conditions; and

(ii) Offers to use the same work force for providing the Federal Government with such services as the source uses for providing such services to the general public;

(6) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions. This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed;

(7) Any item, combination of items, or service referred to in subparagraphs (c)(1) through (c)(6), notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a Contractor; or

(8) A nondevelopmental item, if the procuring agency determines the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local Governments.

(d) *Component* means any item supplied to the Federal Government as part of an end item or of another component.

(e) *Nondevelopmental item* means—

(1) Any previously developed item of supply used exclusively for governmental

purposes by a Federal agency, a State or local government, or a foreign government with which the United States has a mutual defense cooperation agreement;

(2) Any item described in paragraph (e)(1) of this definition that requires only minor modification or modifications of a type customarily available in the commercial marketplace in order to meet the requirements of the procuring department or agency; or

(3) Any item of supply being produced that does not meet the requirements of paragraph (e)(1) or (e)(2) solely because the item is not yet in use.

* * * * *

(End of clause)

52.203-4 [Amended]

77. Section 52.203-4 is amended in the first sentence of the introductory text by removing "(b)(5)" and inserting "(b)(6)" in its place.

78. Section 52.203-6 is amended by revising the date of the clause and adding an Alternate I following paragraph (c) to read as follows:

52.203-6 Restrictions on Subcontractor Sales to the Government.

Restrictions on Subcontractor Sales to the Government (Oct. 1995)

* * * * *

Alternate I (OCT. 1995). As prescribed in 3.503-2, substitute the following paragraph in place of paragraph (b) of the basic clause:

(b) The prohibition in paragraph (a) of this clause does not preclude the Contractor from asserting rights that are otherwise authorized by law or regulation. For acquisitions of commercial items, the prohibition in paragraph (a) applies only to the extent that any agreement restricting sales by subcontractors results in the Federal Government being treated differently from any other prospective purchaser for the sale of the commercial item(s).

52.210-1 through 52.210-7 [Redesignated]

79. Sections 52.210-1 through 52.210-7 are redesignated as 52.211-1 through 52.211-7.

52.212-1 through 52.212-11 [Redesignated]

80. Sections 52.212-1 through 52.212-11 are redesignated as 52.211-8 through 52.211-18.

52.212-12 through 52.212-15 [Redesignated]

81. Sections 52.212-12 through 52.212-15 are redesignated as 52.242-14 through 52.242-17, respectively.

52.212-1 through 52.212-5 [Added]

82. Part 52 is amended by adding new sections 52.212-1 through 52.212-5 to read as follows:

Sec.
52.212-1 Instructions to Offerors—
Commercial Items.

52.212-2 Evaluation-Commercial Items.

52.212-3 Offeror Representations and
Certifications-Commercial Items.

52.212-4 Contract Terms and Conditions—
Commercial Items.

52.212-5 Contract Terms and Conditions
Required to Implement Statutes or
Executive Orders-Commercial Items.

52.212-1 Instructions to Offerors— Commercial Items.

As prescribed in 12.301(b)(1), insert the following provision:

Instructions to Offerors—Commercial Items
(Oct. 1995)

(a) *Standard industrial classification (SIC) code and small business size standard.* The SIC code and small business size standard for this acquisition appear in Block 10 of the solicitation cover sheet (SF 1449). However, the small business size standard for a concern which submits an offer in its own name, but which proposes to furnish an item which it did not itself manufacture, is 500 employees.

(b) *Submission of offers.* Submit signed and dated offers to the office specified in this solicitation at or before the exact time specified in this solicitation. Offers may be submitted on the SF 1449, letterhead stationery, or as otherwise specified in the solicitation. As a minimum, offers must show—

- (1) The solicitation number;
- (2) The time specified in the solicitation for receipt of offers;
- (3) The name, address, and telephone number of the offeror;
- (4) A technical description of the items being offered in sufficient detail to evaluate compliance with the requirements in the solicitation. This may include product literature, or other documents, if necessary;
- (5) Terms of any express warranty;
- (6) Price and any discount terms;
- (7) "Remit to" address, if different than mailing address;
- (8) A completed copy of the representations and certifications at FAR 52.212-3;
- (9) Acknowledgment of Solicitation Amendments;
- (10) Past performance information, when included as an evaluation factor, to include recent and relevant contracts for the same or similar items and other references (including contract numbers, points of contact with telephone numbers and other relevant information); and
- (11) If the offer is not submitted on the SF 1449, include a statement specifying the extent of agreement with all terms, conditions, and provisions included in the solicitation. Offers that fail to furnish required representations or information, or reject the terms and conditions of the solicitation may be excluded from consideration.

(c) *Period for acceptance of offers.* The offeror agrees to hold the prices in its offer firm for 30 calendar days from the date specified for receipt of offers, unless another time period is specified in an addendum to the solicitation.

(d) *Product samples.* When required by the solicitation, product samples shall be

submitted at or prior to the time specified for receipt of offers. Unless otherwise specified in this solicitation, these samples shall be submitted at no expense to the Government, and returned at the sender's request and expense, unless they are destroyed during preaward testing.

(e) *Multiple offers.* Offerors are encouraged to submit multiple offers presenting alternative terms and conditions or commercial items for satisfying the requirements of this solicitation. Each offer submitted will be evaluated separately.

(f) *Late offers.* Offers or modifications of offers received at the address specified for the receipt of offers after the exact time specified for receipt of offers will not be considered.

(g) *Contract award (not applicable to Invitation for Bids).* The Government intends to evaluate offers and award a contract without discussions with offerors. Therefore, the offeror's initial offer should contain the offeror's best terms from a price and technical standpoint. However, the Government reserves the right to conduct discussions if later determined by the Contracting Officer to be necessary. The Government may reject any or all offers if such action is in the public interest; accept other than the lowest offer; and waive informalities and minor irregularities in offers received.

(h) *Multiple awards.* The Government may accept any item or group of items of an offer, unless the offeror qualifies the offer by specific limitations. Unless otherwise provided in the Schedule, offers may not be submitted for quantities less than those specified. The Government reserves the right to make an award on any item for a quantity less than the quantity offered, at the unit prices offered, unless the offeror specifies otherwise in the offer.

(i) *Availability of requirements documents cited in the solicitation.* (1) The Index of Federal Specifications, Standards and Commercial Item Descriptions and the documents listed in it may be obtained from the General Services Administration, Federal Supply Service Bureau, Specifications Section, Suite 8100, 470 L'Enfant Plaza, SW., Washington, DC 20407 ((202) 755-0325/0326).

(2) The DOD Index of Specifications and Standards (DODISS) and documents listed in it may be obtained from the Standardization Documents Desk, Building 4D, 700 Robbins Avenue, Philadelphia, PA 19111-5094 (telephone (215) 697-2569).

(i) Automatic distribution may be obtained on a subscription basis.

(ii) Individual documents may be ordered from the Telespecs ordering system by touch-tone telephone. A customer number is required to use this service and can be obtained from the Standardization Documents Order Desk or the Special Assistance Desk (telephone (610) 607-2667/2179).

(3) Nongovernment (voluntary) standards must be obtained from the organization responsible for their preparation, publication or maintenance.
(End of provision)

52.212-2 Evaluation—Commercial Items.

As prescribed in 12.301(c), the Contracting Officer may insert a provision substantially as follows:

Evaluation—Commercial Items (Oct. 1995)

(a) The Government will award a contract resulting from this solicitation to the responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, price and other factors considered. The following factors shall be used to evaluate offers:

(Contracting Officer shall insert the significant evaluation factors, such as (i) technical capability of the item offered to meet the Government requirement; (ii) price; (iii) past performance (see FAR 15.605) and include them in the relative order of importance of the evaluation factors, such as in descending order of importance.)

Technical and past performance, when combined, are _____

(Contracting Officer state, in accordance with FAR 15.605, the relative importance of all other evaluation factors, when combined, when compared to price.)

(b) *Options.* The Government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. The Government may determine that an offer is unacceptable if the option prices are significantly unbalanced. Evaluation of options shall not obligate the Government to exercise the option(s).

(c) A written notice of award or acceptance of an offer, mailed or otherwise furnished to the successful offeror within the time for acceptance specified in the offer, shall result in a binding contract without further action by either party. Before the offer's specified expiration time, the Government may accept an offer (or part of an offer), whether or not there are negotiations after its receipt, unless a written notice of withdrawal is received before award.
(End of Provision)

52.212-3 Offeror Representations and Certifications Commercial Items.

As prescribed in 12.301(b)(2), insert the following provision:

Offeror Representations and Certifications—Commercial Items (Oct. 1995)

(a) *Definitions.* As used in this provision:

Emerging small business means a small business concern whose size is no greater than 50 percent of the numerical size standard for the standard industrial classification code designated.

Small business concern means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the criteria in 13 CFR

Part 121 and size standards in this solicitation.

Small disadvantaged business concern means a small business concern that—

(1) Is at least 51 percent unconditionally owned by one or more individuals who are both socially and economically disadvantaged, or a publicly owned business, having at least 51 percent of its stock unconditionally owned by one or more socially and economically disadvantaged individuals, and

(2) Has its management and daily business controlled by one or more such individuals. This term also means a small business concern that is at least 51 percent unconditionally owned by an economically disadvantaged Indian tribe or Native Hawaiian organization, or a publicly owned business having at least 51 percent of its stock unconditionally owned by one or more of these entities, which has its management and daily business controlled by members of an economically disadvantaged Indian tribe or Native Hawaiian organization and which meets the requirements of 13 CFR Part 124.

Women-owned small business concern means a small business concern—

(a) Which is at least 51 percent owned by one or more women or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more women; and

(b) Whose management and daily business operations are controlled by one or more women.

Women-owned business concern means a concern which is at least 51 percent owned by one or more women; or in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more women; and whose management and daily business operations are controlled by one or more women.

(b) *Taxpayer identification number (TIN)* (26 U.S.C. 6050M). (1) Taxpayer Identification Number (TIN).

☐ TIN: _____
☐ TIN has been applied for.
☐ TIN is not required because:
☐ Offeror is a nonresident alien, foreign corporation, or foreign partnership that does not have income effectively connected with the conduct of a trade or business in the U.S. and does not have an office or place of business or a fiscal paying agent in the U.S.;
☐ Offeror is an agency or instrumentality of a foreign government;
☐ Offeror is an agency or instrumentality of a Federal, state, or local government;
☐ Other. State basis. _____

(2) Corporate Status.
☐ Corporation providing medical and health care services, or engaged in the billing and collecting of payments for such services;
☐ Other corporate entity;
☐ Not a corporate entity:
☐ Sole proprietorship
☐ Partnership
☐ Hospital or extended care facility described in 26 CFR 501(c)(3) that is exempt from taxation under 26 CFR 501(a).

(3) Common Parent.

☐ Offeror is not owned or controlled by a common parent.

Name and TIN of common parent:

Name _____
TIN _____

(c) Offerors must complete the following representations when the resulting contract is to be performed inside the United States, its territories or possessions, Puerto Rico, the Trust Territory of the Pacific Islands, or the District of Columbia. Check all that apply.

(1) *Small business concern.* The offeror represents as part of its offer that it ☐ is, ☐ is not a small business concern.

(2) *Small disadvantaged business concern.* The offeror represents and certifies that it ☐ is, ☐ is not a small disadvantaged business concern.

(3) *Women-owned small business concern.* The offeror represents that it ☐ is, ☐ is not a women-owned small business concern.

Note: Complete paragraphs (c)(4) and (c)(5) only if this solicitation is expected to exceed the simplified acquisition threshold.

(4) *Women-owned business concern.* The offeror represents that it ☐ is, ☐ is not, a women-owned business concern.

(5) *Tie bid priority for labor surplus area concerns.* If this is an invitation for bid, small business offerors may identify the labor surplus areas in which costs to be incurred on account of manufacturing or production (by offeror or first-tier subcontractors) amount to more than 50 percent of the contract price:

(6) *Small Business Size for the Small Business Competitiveness Demonstration Program and for the Targeted Industry Categories under the Small Business Competitiveness Demonstration Program.* [Complete only if the offeror has certified itself to be a small business concern under the size standards for this solicitation.]

(i) (Complete only for solicitations indicated in an addendum as being set-aside for emerging small businesses in one of the four designated industry groups (DIGs).) The offeror represents as part of its offer that it ☐ is, ☐ is not an emerging small business.

(ii) (Complete only for solicitations indicated in an addendum as being for one of the targeted industry categories (TICs) or four designated industry groups (DIGs).) Offeror represents and certifies as follows:

(A) Offeror's number of employees for the past 12 months (check the Employees column if size standard stated in the solicitation is expressed in terms of number of employees); or

(B) Offeror's average annual gross revenue for the last 3 fiscal years (check the Average Annual Gross Number of Revenues column if size standard stated in the solicitation is expressed in terms of annual receipts)
(Check one of the following):

Number of Employees

____ 50 or fewer
____ 51-100

Average Annual Gross Revenues

____ \$1 million or less
____ \$1,000,001-\$2 million

Number of Employees

☐ 101–250
☐ 251–500
☐ 501–750
☐ 751–1,000
☐ Over 1,000

Average Annual Gross Revenues

☐ \$2,000,001–\$3.5 million
☐ \$3,500,001–\$5 million
☐ \$5,000,001–\$10 million
☐ \$10,000,001–\$17 million
☐ Over \$17 million

(d) Certifications and representations required to implement provisions of Executive Order 11246—

(1) *Certification of non-segregated facilities.* (Applies only if the contract amount is expected to exceed \$10,000)—

By submission of this offer, the offeror certifies that it does not and will not maintain or provide for its employees, any facilities that are segregated on the basis of race, color, religion, or national origin because of habit, local custom, or otherwise and that it does not and will not permit its employees to perform their services at any location where segregated facilities are maintained. The offeror agrees that a breach of this certification is a violation of the Equal Opportunity clause in the contract.

(2) *Previous Contracts and Compliance.* The offeror represents that—

(i) It ☐ has, ☐ has not, participated in a previous contract or subcontract subject either to the Equal Opportunity clause of this solicitation, the clause originally contained in Section 310 of Executive Order 10925, or the clause contained in Section 201 of Executive Order 11114; and

(ii) It ☐ has, ☐ has not, filed all required compliance reports.

(3) *Affirmative Action Compliance.* The offeror represents that—

(i) It ☐ has developed and has on file, ☐ has not developed and does not have on file, at each establishment, affirmative action programs required by rules and regulations of the Secretary of Labor (41 CFR Subparts 60–1 and 60–2), or

(ii) It ☐ has not previously had contracts subject to the written affirmative action programs requirement of the rules and regulations of the Secretary of Labor.

(e) *Certification Regarding Payments to Influence Federal Transactions (31 U.S.C. 1352).* (Applies only if the contract is expected to exceed \$100,000.) By submission of its offer, the offeror certifies to the best of its knowledge and belief that no Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress or an employee of a Member of Congress on his or her behalf in connection with the award of any resultant contract.

(f) *Buy American Act—Trade Agreements—Balance of Payments Program Certificate.* (Applies only if FAR clause 52.225–9, Buy American Act—Trade Agreement—Balance of Payments Program, is included in this solicitation.)

(1) The offeror hereby certifies that each end product, except those listed in paragraph (f)(2) of this provision, is a domestic end product (as defined in the clause entitled “Buy American Act—Trade Agreements Balance of Payments Program”) and that

components of unknown origin have been considered to have been mined, produced, or manufactured outside the United States, a designated country, a North American Free Trade Agreement (NAFTA) country, or a Caribbean Basin country, as defined in section 25.401 of the Federal Acquisition Regulation.

(2) *Excluded End Products:*

Line item No.	Country of origin
_____	_____
_____	_____

(List as necessary)

(3) Offers will be evaluated by giving certain preferences to domestic end products, designated country end products, NAFTA country end products, and Caribbean Basin country end products over other end products. In order to obtain these preferences in the evaluation of each excluded end product listed in paragraph (f)(2) of this provision, offerors must identify and certify below those excluded end products that are designated or NAFTA country end products, or Caribbean Basin country end products. Products that are not identified and certified below will not be deemed designated country end products, NAFTA country end products, or Caribbean Basin country end products. Offerors must certify by inserting the applicable line item numbers in the following:

(i) The offeror certifies that the following supplies qualify as “designated or NAFTA country end products” as those terms are defined in the clause entitled “Buy American Act—Trade Agreements—Balance of Payments Program.”

(Insert line item numbers)

(ii) The offeror certifies that the following supplies qualify as “Caribbean Basin country end products” as that term is defined in the clause entitled “Buy American Act—Trade Agreements—Balance of Payments Program.”

(Insert line item numbers)

(4) Offers will be evaluated in accordance with FAR Part 25.

(g) *Buy American Act—North American Free Trade Agreement (NAFTA) Implementation Act—Balance of Payments Program Certificate.* (Applies only if FAR clause 52.22521, Buy American Act—North American Free Trade Agreement (NAFTA) Implementation Act—Balance of Payments Program, is included in this solicitation.)

(1) The offeror hereby certifies that each end product, except those listed in paragraph (g)(2) of this provision, is a domestic end product (as defined in the clause entitled “Buy American Act—North American Free Trade Agreement (NAFTA) Implementation Act—Balance of Payments Program”) and that components of unknown origin have been considered to have been mined, produced, or manufactured outside the United States.

(2) *Excluded End Products:*

Line item No.	Country of origin
_____	_____
_____	_____

(List as necessary)

(3) Offers will be evaluated by giving certain preferences to domestic end products or NAFTA country end products over other end products. In order to obtain these preferences in the evaluation of each excluded end product listed in paragraph (g)(2) of this provision, offerors must identify and certify below those excluded end products that are NAFTA country end products. Products that are not identified and certified below will not be deemed NAFTA country end products. Offerors must certify by inserting the applicable line item numbers in the following:

The offeror certifies that the following supplies qualify as “NAFTA country end products” as that term is defined in the clause entitled “Buy American Act—North American Free Trade Agreement Implementation Act—Balance of Payments Program.”

(Insert line item numbers)

(4) Offers will be evaluated in accordance with FAR Part 25.

(h) *Certification Regarding Debarment, Suspension or Ineligibility for Award (Executive Order 12549).* The offeror certifies, to the best of its knowledge and belief, that—

(1) The offeror and/or any of its principals ☐ are, ☐ are not presently debarred, suspended, proposed for debarment, or declared ineligible for the award of contracts by any Federal agency, and

(2) ☐ Have, ☐ have not, within a three-year period preceding this offer, been convicted of or had a civil judgment rendered against them for: commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a Federal, state or local government contract or subcontract; violation of Federal or state antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving

stolen property; and ☐ are, ☐ are not presently indicted for, or otherwise criminally or civilly charged by a Government entity with, commission of any of these offenses.

(i) *Procurement Integrity Certification (41 U.S.C. 423)*. (Applies only if the contract is expected to exceed \$100,000.)

I, the undersigned, am the officer or employee responsible for the preparation of this offer. I certify, to the best of my knowledge and belief, that either—

☐ I have no information, or

☐ I have disclosed information to the Contracting Officer concerning a violation or possible violation of subsection (a), (b), (d) or (f) of 41 U.S.C. 423, Procurement Integrity, or its implementing regulations that may have occurred during the conduct of this procurement.

*Signature of the officer or employee
responsible for the offer and date.*

(End of Provision)

52.212-4 Contract Terms and Conditions—Commercial Items.

As prescribed in 12.301(b)(3), insert the following clause:

Contract Terms and Conditions—Commercial Items (Oct 1995)

(a) *Inspection/Acceptance*. The Contractor shall only tender for acceptance those items that conform to the requirements of this contract. The Government reserves the right to inspect or test any supplies or services that have been tendered for acceptance. The Government may require repair or replacement of nonconforming supplies or reperformance of nonconforming services at no increase in contract price. The Government must exercise its postacceptance rights (1) within a reasonable time after the defect was discovered or should have been discovered; and (2) before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.

(b) *Assignment*. The Contractor or its assignee's rights to be paid amounts due as a result of performance of this contract, may be assigned to a bank, trust company, or other financing institution, including any Federal lending agency in accordance with the Assignment of Claims Act (31 U.S.C. 3727).

(c) *Changes*. Changes in the terms and conditions of this contract may be made only by written agreement of the parties.

(d) *Disputes*. This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613). Failure of the parties to this contract to reach agreement on any request for equitable adjustment, claim, appeal or action arising under or relating to this contract shall be a dispute to be resolved in accordance with the clause at FAR 52.233-1, Disputes, which is incorporated herein by reference. The Contractor shall proceed diligently with performance of this contract, pending final resolution of any dispute arising under the contract.

(e) *Definitions*. The clause at FAR 52.202-1, Definitions, is incorporated herein by reference.

(f) *Excusable delays*. The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers. The Contractor shall notify the Contracting Officer in writing as soon as it is reasonably possible after the commencement of any excusable delay, setting forth the full particulars in connection therewith, shall remedy such occurrence with all reasonable dispatch, and shall promptly give written notice to the Contracting Officer of the cessation of such occurrence.

(g) *Invoice*. The Contractor shall submit an original invoice and three copies (or electronic invoice, if authorized,) to the address designated in the contract to receive invoices. An invoice must include—

(1) Name and address of the Contractor;

(2) Invoice date;

(3) Contract number, contract line item number and, if applicable, the order number;

(4) Description, quantity, unit of measure, unit price and extended price of the items delivered;

(5) Shipping number and date of shipment including the bill of lading number and weight of shipment if shipped on Government bill of lading;

(6) Terms of any prompt payment discount offered;

(7) Name and address of official to whom payment is to be sent; and

(8) Name, title, and phone number of person to be notified in event of defective invoice.

Invoices will be handled in accordance with the Prompt Payment Act (31 U.S.C. 3903) and Office of Management and Budget (OMB) Circular A-125, Prompt Payment.

(h) *Patent indemnity*. The Contractor shall indemnify the Government and its officers, employees and agents against liability, including costs, for actual or alleged direct or contributory infringement of, or inducement to infringe, any United States or foreign patent, trademark or copyright, arising out of the performance of this contract, provided the Contractor is reasonably notified of such claims and proceedings.

(i) *Payment*. Payment shall be made for items accepted by the Government that have been delivered to the delivery destinations set forth in this contract. The Government will make payment in accordance with the Prompt Payment Act (31 U.S.C. 3903) and Office of Management and Budget (OMB) Circular A-125, Prompt Payment. Payments under this contract may be made by the Government either by check, electronic funds transfer, or the Automated Clearing House, at the option of the Government.

In connection with any discount offered for early payment, time shall be computed from the date of the invoice. For the purpose of computing the discount earned, payment shall be considered to have been made on the date which appears on the payment check or the date on which an electronic funds transfer was made.

(j) *Risk of loss*. Unless the contract specifically provides otherwise, risk of loss or damage to the supplies provided under this contract shall remain with the Contractor until, and shall pass to the Government upon:

(1) Delivery of the supplies to a carrier, if transportation is f.o.b. origin; or

(2) Delivery of the supplies to the Government at the destination specified in the contract, if transportation is f.o.b. destination.

(k) *Taxes*. The contract price includes all applicable Federal, State, and local taxes and duties.

(l) *Termination for the Government's convenience*. The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination. The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give the Government any right to audit the Contractor's records. The Contractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

(m) *Termination for cause*. The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

(n) *Title*. Unless specified elsewhere in this contract, title to items furnished under this contract shall pass to the Government upon acceptance, regardless of when or where the Government takes physical possession.

(o) *Warranty*. The Contractor warrants and implies that the items delivered hereunder are merchantable and fit for use for the particular purpose described in this contract.

(p) *Limitation of liability*. Except as otherwise provided by an express or implied warranty, the Contractor will not be liable to the Government for consequential damages resulting from any defect or deficiencies in accepted items.

(q) *Other compliances*. The Contractor shall comply with all applicable Federal, State and local laws, executive orders, rules

and regulations applicable to its performance under this contract.

(r) *Compliance with laws unique to Government contracts.* The Contractor agrees to comply with 31 U.S.C. 1352 relating to limitations on the use of appropriated funds to influence certain Federal contracts; 18 U.S.C. 431 relating to officials not to benefit; 40 U.S.C. 327, *et seq.*, Contract Work Hours and Safety Standards Act; 41 U.S.C. 51–58, Anti-Kickback Act of 1986; 41 U.S.C. 251 related to whistle blower protections; and 49 U.S.C. 40118, Fly American.

(s) *Order of precedence.* Any inconsistencies in this solicitation or contract shall be resolved by giving precedence in the following order: (1) the schedule of supplies/services; (2) the Assignments, Disputes, Payments, Invoice, Other Compliances, and Compliance with Laws Unique to Government Contracts paragraphs of this clause; (3) the clause at 52.212–5; (4) addenda to this solicitation or contract, including any license agreements for computer software; (5) solicitation provisions if this is a solicitation; (6) other paragraphs of this clause; (7) the Standard Form 1449; (8) other documents, exhibits, and attachments; and (9) the specification.

(End of clause)

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

As prescribed in 12.301(b)(4), insert the following clause:

Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items (Oct 1995)

(a) The Contractor agrees to comply with the following FAR clauses, which are incorporated in this contract by reference, to implement provisions of law or Executive orders applicable to acquisitions of commercial items:

(1) 52.222–3, Convict Labor (E.O. 11755); and

(2) 52.233–3, Protest After Award (31 U.S.C. 3553 and 40 U.S.C. 759).

(b) The Contractor agrees to comply with the FAR and FIRM clauses in this paragraph (b) which the contracting officer has indicated as being incorporated in this contract by reference to implement provisions of law or executive orders applicable to acquisitions of commercial items or components:

(Contracting Officer shall check as appropriate.)

(1) 52.203–6, Restrictions on Subcontractor Sales to the Government, with Alternate I (41 U.S.C. 253g and 10 U.S.C. 2402).

(2) 52.203–10, Price or Fee Adjustment for Illegal or Improper Activity (41 U.S.C. 423).

(3) 52.219–8, Utilization of Small Business Concerns and Small Disadvantaged Business Concerns (15 U.S.C. 637 (d) (2) and (3));

(4) 52.219–9, Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan (15 U.S.C. 637 (d)(4));

(5) 52.219–14, Limitation on Subcontracting (15 U.S.C. 637(a)(14)).

(6) 52.222–26, Equal Opportunity (E.O. 11246).

(7) 52.222–35, Affirmative Action for Special Disabled and Vietnam Era Veterans (38 U.S.C. 4212).

(8) 52.222–36, Affirmative Action for Handicapped Workers (29 U.S.C. 793).

(9) 52.222–37, Employment Reports on Special Disabled Veterans and Veterans of the Vietnam Era (38 U.S.C. 4212).

(10) 52.225–3, Buy American Act—Supplies (41 U.S.C. 10).

(11) 52.225–9, Buy American Act—Trade Agreements Act—Balance of Payments Program (41 U.S.C. 10, 19 U.S.C. 2501–2582).

(12) 52.225–17, Buy American Act—Supplies Under European Community Sanctions for End Products (E.O. 12849).

(13) 52.225–18, European Community Sanctions for End Products (E.O. 12849).

(14) 52.225–19, European Community Sanctions for Services (E.O. 12849).

(15) 52.225–21, Buy American Act—North American Free Trade Agreement Implementation Act—Balance of Payments Program (41 U.S.C. 10, Pub. L. 103–187).

(16) 52.247–64, Preference for Privately Owned U.S.-Flag Commercial Vessels (46 U.S.C. 1241).

(17) 201–39.5202–3, Procurement Authority (FIRM).

(This acquisition is being conducted under _____ delegation of GSA's exclusive procurement authority for FIP resources. The specific GSA DPA case number is _____).

(c) The Contractor agrees to comply with the FAR clauses in this paragraph (c), applicable to commercial services, which the Contracting Officer has indicated as being incorporated in this contract by reference to implement provisions of law or executive orders applicable to acquisitions of commercial items or components:

(Contracting Officer check as appropriate.)

(1) 52.222–41, Service Contract Act of 1965, As amended (41 U.S.C. 351, *et seq.*).

(2) 52.222–42, Statement of Equivalent Rates for Federal Hires (29 U.S.C. 206 and 41 U.S.C. 351, *et seq.*).

(3) 52.222–43, Fair Labor Standards Act and Service Contract Act—Price Adjustment (Multiple Year and Option Contracts) (29 U.S.C. 206 and 41 U.S.C. 351, *et seq.*).

(4) 52.222–44, Fair Labor Standards Act and Service Contract Act—Price Adjustment (29 U.S.C. 206 and 41 U.S.C. 351, *et seq.*).

(5) 52.222–47, SCA Minimum Wages and Fringe Benefits Applicable to Successor Contract Pursuant to Predecessor

Contractor Collective Bargaining Agreement (CBA) (41 U.S.C. 351, *et seq.*).

(d) *Comptroller General Examination of Record.* The Contractor agrees to comply with the provisions of this paragraph (d) if this contract was awarded using other than sealed bid, is in excess of the simplified acquisition threshold, and does not contain the clause at 52.215–2, Audit and Records—Negotiation.

(1) The Comptroller General of the United States, or an authorized representative of the Comptroller General, shall have access to and right to examine any of the Contractor's directly pertinent records involving transactions related to this contract.

(2) The Contractor shall make available at its offices at all reasonable times the records, materials, and other evidence for examination, audit, or reproduction, until 3 years after final payment under this contract or for any shorter period specified in FAR Subpart 4.7, Contractor Records Retention, of the other clauses of this contract. If this contract is completely or partially terminated, the records relating to the work terminated shall be made available for 3 years after any resulting final termination settlement. Records relating to appeals under the disputes clause or to litigation or the settlement of claims arising under or relating to this contract shall be made available until such appeals, litigation, or claims are finally resolved.

(3) As used in this clause, records include books, documents, accounting procedures and practices, and other data, regardless of type and regardless of form. This does not require the Contractor to create or maintain any record that the Contractor does not maintain in the ordinary course of business or pursuant to a provision of law.

(e) Notwithstanding the requirements of the clauses in paragraphs (a), (b), (c) or (d) of this clause, the Contractor is not required to include any FAR clause, other than those listed below (and as may be required by an addenda to this paragraph to establish the reasonableness of prices under Part 15), in a subcontract for commercial items or commercial components—

(1) 52.222–26, Equal Opportunity (E.O. 11246);

(2) 52.222–35, Affirmative Action for Special Disabled and Vietnam Era Veterans (38 U.S.C. 2012(a)); and

(3) 52.222–36, Affirmative Action for Handicapped Workers (29 U.S.C. 793).

(4) 52.247–64, Preference for Privately Owned U.S.-Flagged Commercial Vessels (46 U.S.C. 1241) (flow down not required for subcontracts awarded beginning May 1, 1996).

(End of clause)

83. In the list of newly designated sections below, for each clause or provision indicated in the left column, remove the reference listed in the middle column and insert the reference listed in the right column:

Clause/provision	Remove	Insert
52.211-1	10.011(a)	11.203(a)
52.211-2	10.011(b)	11.203(b)
52.211-3	10.011(c)	11.203(c)
52.211-4	10.011(d)	11.203(d)
52.211-5	10.011(e)	11.203(e)
52.211-6	10.011(f)	11.203(f)
52.211-7	10.011(g)	11.203(g)
52.211-8	12.104(a)(2)	11.404(a)(2)
52.211-9	12.104(a)(3)	11.404(a)(3)
52.211-10	12.104(b)	11.404(b)
52.211-11	12.204(a)	11.504(a)
52.211-11	12.202	11.502(b)
52.211-12	12.202	11.502(b)
52.211-12	12.204(b)	11.504(b)
52.211-13	12.204(c)	11.504(c)
52.211-14	12.304(a)	11.604(a)
52.211-15	12.304(b)	11.604(b)
52.211-16	12.403(a)	11.703(a)
52.211-17	12.403(b)	11.703(b)
52.211-18	12.403(c)	11.703(c)
52.242-14	12.505(a)	42.1305(a)
52.242-15	12.505(b)	42.1305(b)
52.242-16	12.505(c)	42.1305(c)
52.242-17	12.505(d)	42.1305(d)

84. Section 52.244-6 is added to read as follows:

52.244-6 Subcontracts for Commercial Items and Commercial Components.

As prescribed in 44.403, insert the following clause:

Subcontracts for Commercial Items and Commercial Components (Oct 1995)

(a) *Definition.*

Commercial item, as used in this clause, has the meaning contained in the clause at 52.202-1, Definitions.

Subcontract, as used in this clause, includes a transfer of commercial items between divisions, subsidiaries, or affiliates of the Contractor or subcontractor at any tier.

(b) To the maximum extent practicable, the Contractor shall incorporate, and require its subcontractors at all tiers to incorporate, commercial items or nondevelopmental items as components of items to be supplied under this contract.

(c) Notwithstanding any other clause of this contract, the Contractor is not required to include any FAR provision or clause, other than those listed below to the extent they are

applicable and as may be required to establish the reasonableness of prices under Part 15, in a subcontract at any tier for commercial items or commercial components:

(1) 52.222-26, Equal Opportunity (E.O. 11246);

(2) 52.222-35, Affirmative Action for Special Disabled and Vietnam Era Veterans (38 U.S.C. 4212(a));

(3) 52.222-36, Affirmative Action for Handicapped Workers (29 U.S.C. 793); and

(4) 52.247-64, Preference for Privately Owned U.S.-Flagged Commercial Vessels (46 U.S.C. 1241) (flow down not required for subcontracts awarded beginning May 1, 1996).

(d) The Contractor shall include the terms of this clause, including this paragraph (d), in subcontracts awarded under this contract. (End of clause)

52.246-11 [Amended]

85. & 86. Section 52.246-11 is amended in the introductory text by removing "46.202-3" and inserting "46.202-4" in its place.

52.246-17 and 52.246-18 [Amended]

87. Sections 52.246-17 and 52.246-18 are amended by removing and reserving Alternate I.

PART 53—FORMS

88. Section 53.212 is added to read as follows:

53.212 Acquisition of commercial items.

SF 1449 (OCT 1995), Solicitation/Contract/Order for Commercial Items. SF 1449 is prescribed for use in solicitations and contracts for commercial items. Agencies may prescribe additional detailed instructions for use of the form.

89. Section 53.301-1449 is added to read as follows:

53.301-1449 (OCT 1995), Solicitation/Contract/Order for Commercial Items

BILLING CODE 6820-EP-P

SOLICITATION/CONTRACT/ORDER FOR COMMERCIAL ITEMS <i>OFFEROR TO COMPLETE BLOCKS 12, 17, 23, 24, & 30</i>				1. REQUISITION NUMBER		PAGE 1 OF	
2. CONTRACT NO.		3. AWARD/EFFECTIVE DATE		4. ORDER NUMBER		5. SOLICITATION NUMBER	
7. FOR SOLICITATION INFORMATION CALL:		a. NAME		b. TELEPHONE NUMBER (No collect calls)		6. SOLICITATION ISSUE DATE	
9. ISSUED BY		CODE		10. THIS ACQUISITION IS		11. DELIVERY FOR FOB DESTINATION UNLESS BLOCK IS MARKED	
				<input type="checkbox"/> UNRESTRICTED <input type="checkbox"/> SET ASIDE: % FOR <input type="checkbox"/> SMALL BUSINESS <input type="checkbox"/> SMALL DISADV. BUSINESS <input type="checkbox"/> 8(A) SIC: SIZE STANDARD:		<input type="checkbox"/> SEE SCHEDULE <input type="checkbox"/> 13a. THIS CONTRACT IS A RATED ORDER UNDER DPAS (15 CFR 700) 13b. RATING 14. METHOD OF SOLICITATION <input type="checkbox"/> RFQ <input type="checkbox"/> IFB <input type="checkbox"/> RFP	
15. DELIVER TO		CODE		16. ADMINISTERED BY		CODE	
17a. CONTRACTOR/OFFEROR		CODE		18a. PAYMENT WILL BE MADE BY		CODE	
TELEPHONE NO.				18b. SUBMIT INVOICES TO ADDRESS SHOWN IN BLOCK 18a UNLESS BLOCK BELOW IS CHECKED		<input type="checkbox"/> SEE ADDENDUM	
<input type="checkbox"/> 17b. CHECK IF REMITTANCE IS DIFFERENT AND PUT SUCH ADDRESS IN OFFER							
19. ITEM NO.	20. SCHEDULE OF SUPPLIES/SERVICES			21. QUANTITY	22. UNIT	23. UNIT PRICE	24. AMOUNT
<i>(Attach Additional Sheets as Necessary)</i>							
25. ACCOUNTING AND APPROPRIATION DATA						26. TOTAL AWARD AMOUNT (For Govt. Use Only)	
<input type="checkbox"/> 27a. SOLICITATION INCORPORATES BY REFERENCE FAR 52.212-1, 52.212-4. FAR 52.212-3 AND 52.212-5 ARE ATTACHED. ADDENDA <input type="checkbox"/> ARE <input type="checkbox"/> ARE NOT ATTACHED. <input type="checkbox"/> 27b. CONTRACT/PURCHASE ORDER INCORPORATES BY REFERENCE FAR 52.212-4. FAR 52.212-5 IS ATTACHED. ADDENDA <input type="checkbox"/> ARE <input type="checkbox"/> ARE NOT ATTACHED.							
28. CONTRACTOR IS REQUIRED TO SIGN THIS DOCUMENT AND RETURN COPIES TO ISSUING OFFICE. CONTRACTOR AGREES TO FURNISH AND DELIVER ALL ITEMS SET FORTH OR OTHERWISE IDENTIFIED ABOVE AND ON ANY ADDITIONAL SHEETS SUBJECT TO THE TERMS AND CONDITIONS SPECIFIED HEREIN.				29. AWARD OF CONTRACT: REFERENCE OFFER DATED . . . YOUR OFFER ON SOLICITATION (BLOCK 6), INCLUDING ANY ADDITIONS OR CHANGES WHICH ARE SET FORTH HEREIN, IS ACCEPTED AS TO ITEMS:			
30a. SIGNATURE OF OFFEROR/CONTRACTOR				31a. UNITED STATES OF AMERICA (SIGNATURE OF CONTRACTING OFFICER)			
30b. NAME AND TITLE OF SIGNER (TYPE OR PRINT)		30c. DATE SIGNED		31b. NAME OF CONTRACTING OFFICER (TYPE OR PRINT)		31c. DATE SIGNED	
32a. QUANTITY IN COLUMN 21 HAS BEEN				33. SHIP NUMBER		34. VOUCHER NUMBER	
<input type="checkbox"/> RECEIVED <input type="checkbox"/> INSPECTED <input type="checkbox"/> ACCEPTED, AND CONFORMS TO THE CONTRACT, EXCEPT AS NOTED				<input type="checkbox"/> PARTIAL <input type="checkbox"/> FINAL		35. AMOUNT VERIFIED CORRECT FOR	
32b. SIGNATURE OF AUTHORIZED GOVT. REPRESENTATIVE		32c. DATE		36. PAYMENT		37. CHECK NUMBER	
				<input type="checkbox"/> COMPLETE <input type="checkbox"/> PARTIAL <input type="checkbox"/> FINAL			
				38. S/R ACCOUNT NUMBER		39. S/R VOUCHER NUMBER	
				42a. RECEIVED BY (Print)		40. PAID BY	
41a. I CERTIFY THIS ACCOUNT IS CORRECT AND PROPER FOR PAYMENT				42b. RECEIVED AT (Location)			
41b. SIGNATURE AND TITLE OF CERTIFYING OFFICER		41c. DATE		42c. DATE REC'D (YY/MM/DD)		42d. TOTAL CONTAINERS	

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Prescribed by GSA - FAR (48 CFR) 53.212

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48 CFR Part 3

[FAC 90-32; FAR Case 94-803; Item IV]

RIN 9000-AG16

Federal Acquisition Regulation; Whistleblower Protections for Contractor Employees (Ethics)

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Technical amendment to final rule.

SUMMARY: At 60 FR 37774, July 21, 1995, a final rule was issued pursuant to the Federal Acquisition Streamlining Act of 1994, Public Law 103-355 (the Act). The Federal Acquisition Regulatory Council is now issuing an *Applicability Date*, in addition to the *Effective Date*, of the regulation.

DATES: Effective Date: September 19, 1995.

Applicability Date: This regulation will apply to contracts in existence as of September 19, 1995, for reprisals to Government contractor employees occurring on or after that date. The remedy provided by this regulation does not apply to contracts otherwise covered by provisions of 10 U.S.C. 2409a.

FOR FURTHER INFORMATION CONTACT: Mr. Julius Rothlein, Ethics Team Leader, at (703) 697-4349 in reference to this FAR case.

SUPPLEMENTARY INFORMATION:

Background:

FAC 90-30, FAR case 94-803, implemented Sections 6005 and 6006 of the Act, Whistleblower Protections for Contractor Employees. These protections are now virtually identical for contractors employed by both DOD and civilian agencies.

The rule as originally published did not specifically discuss the extent of retroactivity. The rule did not require a contract clause. To clarify this, the FAR Council is establishing the extent of the rule's retroactivity.

Some existing Department of Defense contracts contain a contractor employee whistleblower clause, based on prior statute (10 U.S.C. 2409a). That law was narrower in scope and only applied to certain DoD contracts.

Dated: September 7, 1995.

Edward C. Loeb,

Deputy Project Manager for the Implementation of the Federal Acquisition Streamlining Act of 1994.

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48 CFR Parts 4, 5, 6, 9, 14, 15, 16, 17, 19, 20, 25, 26, 42, 44, 52 and 53

[FAC 90-32; FAR Case 94-780; Item V]

RIN 9000-AG37

Federal Acquisition Regulation; Small Business

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Federal Acquisition Regulatory Council has agreed on a final rule to amend the Federal Acquisition Regulation (FAR) to implement sections 7101(a) and 7106 and to augment regulation implementation of Section 10004 of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355), dated October 13, 1994. Section 7101(a) of FASA deletes sections 15(e) and (f) from the Small Business Act. Those sections established the priority for award of set-asides and provided the statutory basis for a procurement preference for concerns located in Labor Surplus Areas (LSA). Based on this deletion, this rule removes the LSA set-aside program and LSA subcontracting program from the FAR.

Section 7106 of FASA revises sections 8 and 15 of the Small Business Act to accommodate a Governmentwide goal of 5 percent for women-owned small businesses. This rule deletes existing, separate coverage relating to women-owned businesses and revises existing coverage to place women-owned small businesses on an equal footing with small disadvantaged businesses. In connection with this revision, the Standard Forms 294 and 295 are revised and streamlined.

Section 10004 of FASA, which requires the collection of specified data through the Federal Procurement Data System, is being implemented by FAR case 94-701. This rule augments that coverage by providing a solicitation provision to collect the information on women-owned businesses as required by that FAR case.

This regulatory action was subject to Office of Management and Budget

review under Executive Order 12866, dated September 30, 1993.

EFFECTIVE DATE: October 1, 1995.

FOR FURTHER INFORMATION CONTACT: Ms. Victoria Moss, Small Business Team Leader, at (202) 501-4764 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAC 90-32, FAR case 94-780.

SUPPLEMENTARY INFORMATION:

A. Background

The Federal Acquisition Streamlining Act of 1994 (the Act), Pub. L. 103-355, provides authorities that streamline the acquisition process and minimize burdensome Government-unique requirements. The following sections of the Federal Acquisition Streamlining Act are implemented by this final rule:

Section 7101, Repeal of Certain Requirements, paragraph (a), deletes sections 15(e) and (f) from the Small Business Act. These sections established the priority for the award of contracts and subcontracts in carrying out the set-aside programs.

Section 7106, Procurement Goals for Small Business Concerns Owned by Women, establishes a Governmentwide goal for participation by women-owned small business concerns in prime and subcontracts and revises sections 8 and 15 of the Small Business Act to accommodate the goal.

Section 10004, Data Collection through the Federal Procurement Data System, has been implemented in FAR case 94-701. This rule augments that implementation.

These sections are implemented in this final rule by way of the following substantial changes:

Elimination of the Labor Surplus Area (LSA) set-aside program;

Development of coverage giving women-owned small businesses equal standing with small and small disadvantaged business in subcontracting plans;

Issuance of an abbreviated provision to allow firms to represent their status as small, small disadvantaged and/or women-owned small business in one place;

Simplification and streamlining of the Standard Form (SF) 294, Subcontract for Individual Contracts, and SF 295, Summary Subcontract Report;

Inclusion of a solicitation provision collecting information on women-owned businesses.